

COMMERCIAL LAW

PETERS



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THE UNITED STATES SUPREME COURT.

This photograph shows the United States Supreme Court as constituted November 7, 1925. The members are, seated left to right: James Clark McReynolds, Oliver Wendell Holmes, Chief Justice William Howard Taft, Willis Van Devanter and Louis Brandeis. Standing left to right: Edward Terry Sanford, George Sutherland, Pierce Butler and Hanftan Fiske Stone.

(SEE PAGE V)

Commercial Law

With Illustrative Examples
and Legal Forms

By
P. B. S. Peters, LL. B.

"Laws are not made like nets—to catch, but
like sea-marks—to guide."—*Sir Philip Sidney.*

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THE SUPREME COURT.

"That which by natural reason prevails among men is called the law of nations."

The Constitution of the United States provides that the "judicial power of the United States shall be vested in one supreme court and such inferior courts as Congress shall from time to time ordain and establish." The Supreme Court is, therefore, the most responsible body in the land. The decisions of this court are the final decisions of the government. The sessions are held at Washington and the only questions decided are those of law. Without a court law does not exist.

The court consists of nine judges, called justices of the Supreme Court, and the whole body is called the Supreme Bench. The authority vested in this body makes it one of the most responsible departments of the entire government. The presiding judge is called the Chief Justice of the United States.

As the Constitution does not determine the number of the judges of the Supreme Court, the number may be changed at pleasure, except that it cannot be diminished so as to deprive a judge of his office.

PREFACE

The noteworthy prominence given to Commercial Law in "courses of study" in recent years is worthy evidence of its educational and practical value. It is reasonable to assert that there is no other subject containing so many elements calculated to arouse and maintain interest; for it is a subject as broad as the field of human endeavor. Nor is there another study that affords such an excellent means of developing logical reasoning and precise thinking as a study of the laws related to business affairs.

The purpose of this book is to aid the student in acquiring a knowledge of those legal principles needed in his future activities. On the other hand, the man of experience may find much of value to enlighten him as well as to define more correctly his rights, his duties, and his obligations to others. To this end it has been the aim of the writer to give in clear and concrete language a sufficiently detailed exposition of the law as applied to business affairs to justify its preparation. Clearness has never been sacrificed for the sake of brevity.

The subjects discussed and the manner of presenting them are the result of many delightful years in teaching law to young but appreciative students. The illustrations are largely from judicial decisions; and those who have an opportunity to read the complete cases will do so with profit and pleasure. Authorities will be found quoted as a guide to furnish the reader with sources of search and inquiry should he desire to use them, and as evidence of the scope of the work.

Legal maxims are short and formal statements of established principles of law. They are among the most important and valuable portions of the common law. They were originally formulated in a period when writing, as an art, was comparatively unknown. Their daily reading and study will tend to fix certain principles more clearly than any one other fact.

The author acknowledges his indebtedness to the following eminent lawyers and judges who read that part of the manuscript pertaining to their particular specialty; and whose many helpful suggestions and kindly approval have contributed to the value of this work: Hon. E. D. Ellison, Dean of the Kansas City School of Law and Lecturer on Bills and Notes; Hon. John I. Williamson, Member of the Supreme Court, State of Missouri, and Former President of the Kansas City Bar Association and Lecturer on Agency, and Master and Servant; Hon. Floyd E. Jacobs, Prosecuting Attorney, Jackson County, Criminal Offenses; Hon. R. W. Street, Lecturer on Contracts, Kansas City School of Accountancy, Law and Finance; Hon. Thomas J. Higgs, Assistant Attorney General of Missouri, Bailments and Sales; Mr. D. D. Denham, of the law firm of Meriwether, Denham and Denham, Corporations; Mr. James L. Kilroy, Assistant Prosecuting Attorney, Jackson County, Guaranty and Suretyship; and Hon. D. E. Stoner, special practitioner in Real Property. Also to M. B. Wallace, Polytechnic High School, St. Joseph, Mo., for his kindly criticism, aid, and counsel.

This expression of appreciation is also due to the numerous other lawyers, business men and teachers who have so generously "aided and abetted" in the preparation of the text; their practical suggestions have added to the usefulness of the book.

February, 1922.

P. B. S. PETERS.

CONTENTS

"Laws are not masters, but servants, and he rules them who obeys them."
—*Beecher.*

	Page
LAW IN GENERAL	1
PROPERTY	6
CONTRACTS	
General Principles	11
Parties Competent to Contract.....	19
Mutual Assent	25
Reality of Consent.....	29
Subject-Matter or Legality of Object.....	33
Consideration	39
Statute of Frauds	44
Operation of Contracts.....	48
How to Draw a Written Contract.....	51
Termination	55
NEGOTIABLE INSTRUMENTS	
In General	67
Bills of Exchange.....	71
Promissory Notes	76
Checks	82
Form and Interpretation	88
Indorsements	94
Defenses and Presentment	99
GUARANTY AND SURETY	106
SALES OF PERSONAL PROPERTY	
Formation of the Contract.....	113
Statutes of Frauds as Applied to Sales.....	120
Transfer of Title.....	124
Rights of the Unpaid Seller.....	129
Warranties	132
BAILMENTS	
Introduction and General Principles.....	137
Rights of the Bailor and Bailee.....	140
Hotel, Inn and Boardinghouse Keepers.....	147
COMMON CARRIERS	
Carriers of Goods.....	150
Carrier's Duties	154
Public Carriers of Passengers.....	159
AGENCY	163
MASTER AND SERVANT.....	176
PARTNERSHIP	
Introduction	181
Mutual Rights and Duties.....	189

CORPORATIONS	Page
General Nature	197
Articles of Association.....	199
Powers and Management.....	201
Body Corporate	204
Partnership and Corporation Compared.....	209
INSURANCE	
General Principles	211
Fire Insurance	215
Life Insurance	220
REAL PROPERTY	
General Nature and Classification.....	225
Estates in Land.....	228
Conveyance of Real Property.....	231
Wills, Devise and Joint Tenants.....	240
Mortgages	245
Landlord and Tenant	249
Fixtures	257
BUSINESS CRIMES	261
HISTORY OF A LAW SUIT	
The Beginning	271
The Courts	274
The Trial	277
GLOSSARY OF LEGAL TERMS.....	280
LEGAL MAXIMS	286
INDEX	292

ILLUSTRATIONS

Frontispiece—United States Supreme Court.....	Page ii
John Marshall, former Chief Justice of the United States Supreme Court	13
Ancient Babylonian Contract.....	17
Check received by U. S. Government.....	75
Sir Francis Bacon, Philosopher and Law Reformer.....	115
Edward Douglass White, late Chief Justice of the United States Supreme Court.....	165
Deed by William Penn.....	232
William Howard Taft, Chief Justice of the United States...	259

“Law and equity are two things which God hath joined together, but which man hath put asunder.”—*Colton*.

COMMERCIAL LAW

CHAPTER I.

LAW IN GENERAL: ITS CLASSIFICATION AND SOURCES.

When Reason Fails, the Law Ceases.

§ 1. **Law defined.**—The principles upon which all laws are founded are those of common sense. It is this truth which justifies the rule that ignorance of the law is no excuse for its violation, since it is in the power of every man to ascertain, if he does not already know, what are his rights, his duties, and his obligations to himself and to his fellowman.

In its broadest sense, law is a rule of action fixed, prescribed, or laid down beforehand, and includes the laws of God, the moral law, the laws of nature, the laws of logic, and the like, as well as the laws of nations, states, and municipalities.

The term *law*, in a legal sense, includes the rules that have been formulated and established for regulating and governing human conduct; and are recognized, applied and enforced by courts in the administration of justice and in deciding controversies. This law may be in the form of legislative enactments known as “statutory law,” or it may be what is known as the “common law,” sometimes in a figurative sense called the “unwritten law.”

§ 2. **Sources of law.**—In the United States laws are derived from three sources, as follows:

- First. Constitutions, federal and state;
- Second. Statutes, federal and state; and
- Third. The common law.

§ 3. (1) **Constitutions.**—The Constitution of the United States is a written instrument adopted by the people “in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.” It is the fundamental law of the nation and constitutes the framework of the federal government. The powers of the federal government are those expressed in the constitution or implied therein, and the powers not so delegated or prohibited are reserved to the several states or to the people. The constitution and the laws and treaties made thereunder are declared to be “the supreme law of the land.” (See Art. VI, second paragraph of the Constitution of the U. S.)

The constitution of a state is a written instrument adopted by

the people of a state, which they may change at pleasure so long as it does not violate the provisions of the federal constitution, statutes, or treaties. It is a limitation placed upon the reserved power of the state. It constitutes the framework of the state government and it is the supreme law within the state.

The United States constitution is superior to a state constitution, and any part of a state constitution in conflict with the United States constitution is absolutely void.

§ 4. (2) **Statute law.**—The power to enact statutes is governed by the constitution. Those rules which are adopted by Congress and approved by the president are called “federal laws;” they must not violate the provisions of the federal constitution. The laws adopted by the state legislature and approved by the governor are called “state statutes;” the statutes of a state must not be contrary either to the federal or the state constitution. A law contrary to either of these is said to be “unconstitutional,” that is, of no effect whatever. It is one of the functions of a court to decide whether or not a statute is unconstitutional.

Statutes may change or modify the common law, as has been done in most of the states by abolishing days of grace in negotiable instruments or by permitting a married woman to hold property to the same extent as though unmarried, which she was formerly unable to do. In other cases the statutes may declare and put in definite terms parts of the common law in order to establish it firmly. Legislative bodies have the power to pass statutes modifying or suspending the common law; but until they do so the principles of the common law as defined by the courts are as binding upon the citizens of a state as though passed by a legislative body.

§ 5. (3) **Common law.**—When there is no statute applicable to determine the merits of a controversy between adverse parties the common law affords a rule and guide. The term “common law” in this country is understood to mean the unwritten law of England so far as it is not inconsistent with our constitution and statutes; it consists of broad and comprehensive principles inspired by reason and a sense of justice and receives its binding force from common consent and immemorial usage “whence the mind of man runneth not to the contrary.” Therefore, it may be said to have had its beginning in so remote an antiquity that its source can not be traced. It is the product of evolution and not legislation, for those who presided as judges in the remote past and who rendered judicial decisions assumed there was a law not made by legislatures and that it was part of the life and custom of the people.

§ 6. **Precedents.**—There existed in medieval England organ-

ized courts administering justice. The judicial decisions of these courts in turn became what we now call precedents, which were followed by other courts in determining like matters. These decisions expressed the conception of the judges and their interpretation of what the law was. The judges were not, technically speaking, the source of the law, but were the means by which it was expressed; they declared its existence. But in addition there were other sources of information whose influence had a bearing on the declaring of the custom, usage, or law besides the decision of the judges. Such were opinions of legal writers; the teachings of books upon religion and morality; and the customs ordinarily followed in the community. Again, decisions were based upon grounds of reason and public policy, and upon the principles of right and wrong or of justice and injustice between man and man.

Modern courts follow the same practice. Hence it may be said that the cardinal principle of our system of jurisprudence is that, when a point of law has been once officially decided, it forms the rule for deciding all subsequent litigation to which it is applicable,—that is, where the same questions are involved and the facts are substantially the same. The rule may be thus expressed: Like cases are to be treated by similar decisions. Also, the certainty of a rule is more important than the reason for it.

§ 7. **Our heritage.**—The great body of our law—the common law of England—is a direct heritage, brought to us by the early colonists. It was the substratum of the jurisprudence of the thirteen colonies first adopting the Constitution of the United States. Other states formed out of this original territory came under the dominion of the same law. It is a settled policy that whenever a country is acquired by treaty or purchase, it retains the law in force at the time of the change until it is abrogated or altered by its new masters.

Many of the states have adopted by express legislative enactments the common law in force in England at the time of the settlement of the English at Jamestown in 1607, while other states fix a latter date. Louisiana is the only state which has retained as the basis of its jurisprudence any other law, although Florida, California, and New Mexico show some traces of Spanish influence in their laws. Louisiana was a part of the territory ceded to this country by France and it kept the Roman civil law in effect at the time the grant was made.

All law has the same ultimate object—the safeguarding of liberty and property rights. The civil law that prevails in Louisiana is founded upon the Roman Law coming through the Code Napoleon compiled in 1810. Under these laws the individual is as sufficiently protected as in any of the common law states. The chief difference between the foundation law of this one state

and of the other states of the Union is in the matter of court procedure—methods by which suits are instituted and conducted.

In the courts of practically all the other states there is what is termed a law side and an equity proceeding, and the two are not confounded. In Louisiana there is no equity side, the law and equity being passed upon in the same proceeding. The civil law pertaining to the family is considerably different from the common law. Under the Roman law, the father had no power to bequeath his estate to strangers, but if a minor married without the consent of his parents he might then be disinherited. The wife's value in taking care of the home is considered equal to that of the husband, and she is therefore entitled to half of whatever he earns. The law relating to real property is much simpler than that of the common law states. But in the main the laws do not differ any more radically from those of the other states than the laws of the other states differ from each other.

§ 8. **Roman law.**—What is known as the Civil Law of Rome grew out of the commentaries on the Twelve Tablets. The laws of these tablets were framed 451-449 B. C. by commissioners consisting of magistrates, called the decemvirs. They formulated a code which was published on twelve bronze tablets and these were posted in the city square or forum. One thousand years after these tablets had been given to the Romans, Justinian, a Roman ruler, with the assistance of an eminent lawyer, digested, simplified and codified the great mass of laws, opinions and commentaries that had accumulated during that time, and formed from them a body of laws called The Justinian Code, the Pandects and the Institutes. This work of Justinian, which was the greatest of the age and for which he has been called the "lawgiver of civilization," has formed the basis of the jurisprudence of continental Europe. It is usually referred to as the civil law.

§ 9. **Law merchant.**—The term law merchant was originally applied to a system of special rules governing merchants and mercantile transactions. These rules were founded upon the usages and customs of merchants, especially foreign merchants, and were anciently administered in special courts which were in the main conducted by the merchants themselves, in the port towns and trade centers. In time, these courts died out and the principles and rules applied to mercantile transactions finally became merged into the general good of the common law, and the law merchant as a separate system ceased to exist.

The principal subjects covered by the law merchant were insurance, bills and notes, partnership, bailments, and sales.

§ 10. **Commercial law.**—The term commercial law is applied to that portion of the general law which is particularly applicable to business transactions, the acquisition of property, and the relations of persons engaged in business.¹ It especially in-

¹ Business—That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit, is business.

cludes the laws relating to contracts in general, but it also deals with special contracts connected with commercial affairs, and is, therefore, more comprehensive than the early "law merchant," for that was confined mainly to a limited class of persons, and to but a few phases of law.

The chief aim of the study of commercial law is to acquaint the student with the essential elementary principles of law that he may enforce and enjoy his rights and thereby avoid making mistakes resulting from a lack of legal knowledge. The intricate and technical problems of law must, however, be left to the lawyer and practitioner. An amateur lawyer should be considered in the same category as an amateur surgeon.

QUESTIONS

What are the principles upon which laws are founded? Why is it the duty of everyone to know the law of his country? What is law? Why is law necessary? Do all nations have laws? What is mob law? From what three general sources are laws derived? Which source is the highest?

What is meant by a constitution? How is a constitution formed, and adopted? Under what conditions may it be changed? Is a constitution written or unwritten? (Do the people of England have a written constitution in the same sense that we of the United States have?) Why is the constitution declared to be "the supreme law of the land?" Does each state have a constitution?

What is statute law? Give several examples. How are statutes enacted, and how changed? How are laws repealed?

What is meant by common law? When and where did it have its beginning, and how extensively is it in force at the present time? Why is the common law called unwritten law? May a statute modify or change the common law? Give several illustrations. Are customs laws? What are customs?

What is (a) an ordinance? (b) a code? (c) a precedent? Of what particular value is a precedent? Can judges make law?

From what source do we get the great body of our laws? How are these laws adopted? What forms the basis of law in Louisiana?

In what respect does the civil or Roman law differ from the common law? Where did the civil law originate, and how?

What is meant by the term **law merchant**? What subjects did it originally cover?

What is commercial law, and what is to be gained by its study?

CASE PROBLEMS

Case problem No. 1.—Smart and Slick made a contract January 1. Smart was to ship to Slick "about" 1000 tons of structural steel each month for a period of one year. Smart shipped 850 tons in January, 900 tons in February, and 700 tons in March. Slick then gave Smart notice that he would not accept any more steel claiming that Smart had broken the contract; that the amount of steel was not "about" 1000 tons as agreed. Now, if these parties go to court and if there is no precedent covering a similar case how would a rule be established? What would be the future application of the rule?

CHAPTER II.

PROPERTY.

Kinds, Acquisition, and Transfer of Property.

§ 11. **Property.**—The word “property” may be defined briefly as the exclusive right which a man has to possess, enjoy, or dispose of anything that may be owned. The meaning of the word from which it is derived—*proprius*—is “one’s own.” In its widest sense property embraces every species of a valuable right and interest capable of being available for payment of debts or of passing to the representative of the owner upon the latter’s death. It includes real and personal property, as a mining claim or a debt, but not the sea or the air.

They belong to mankind in common, and are, therefore, not capable of exclusive ownership by any particular person. But if an individual inclose a certain portion of air or water in a receptacle, then so long as he thus retains it in that receptacle it is his exclusive property. It will be seen that property is the product of nature or of labor.

It must be understood that the term “exclusive right” does not confine the ownership of property to any one individual, for it may be legally owned by two or more persons at the same time, either jointly, or in common.

Limitations of absolute ownership.—There is, in a strict sense of the word, no such thing as the absolute ownership of property. There is a limitation incident to the necessary requirements of organized society and civil government:

First. A person is not at liberty to so use his own as to injure the rights of another.

Second. The government has the right to take private property for public use upon making just compensation, as where a site is condemned for a post-office building.

Third. The right of the government upon so much property of a citizen as may be necessary for its maintenance and administration.

Fourth. The State has the authority to control the use of property in the hands of its owners, within certain limits; and in some instances to take it away from them.

Fifth. The property of every person is liable for the payment of all of his just debts, unless otherwise exempt by statute. Nor can he legally dispose of it by gift or sale in fraud of his creditors.

§ 12. **Kinds of Property.**—Property may be divided into two general classes: (1) real property; (2) personal property.

Real property is the term applied to land or real estate. It is property which is immovable and permanent in its character and use, such as structures, the annexed fixtures, the trees and

vegetation above the soil as well as the mineral underneath its surface.

Personal property is movable in its nature, and includes every particular sort of property not possessing the nature of real property, such as promissory notes, merchandise, crops, furniture, mortgages, books, stocks and bonds, animals, patents, manufactured goods, and the like. Personal property may be changed into real property, as where one takes brick and mortar—all personal property—and constructs a house with them, which is then considered real property; and if in the lapse of time that same house be razed to the ground and the building material sold as such they again acquire the characteristics of personal property.

Chattels.—The name “chattel” is frequently applied to personal property and is the term usually employed at the common law to denote personal property in general. It is a more extensive term than goods or effects and includes every kind of property except property in land. Its meaning is commonly confined to things movable in their character, as animals, machinery, grain, or any article that can be handled and transported.

The necessity for distinguishing between real and personal property arises from the fact that the laws applicable to the former are quite different from those applicable to the latter.

The laws relative to real property were largely developed out of the feudal system in the early history of England. The feudal system had but little influence upon the formation of laws relative to personal property. The latter grew up largely through the customs of merchants.

Real property can only be disposed of in accordance with the law where it is situated, while personal property is governed by the law where the transaction occurs. Real property is conveyed by a formal written instrument while personal property is transferred in an informal manner. Real property is subject to dower while personal property is not.

§ 13. **Ways of acquiring title to personal property.**—The two general ways in which title to personal property may be obtained are: (1) by original acquisition; (2) by transfer.

§ 14. (1) **Acquisition.**—Under original acquisition the first general method of acquiring title is by occupancy. This is brought about by taking into one's possession what previously belonged to no other person, or what was abandoned by a prior owner.

Wild animals belong to no one in particular until they are captured. Whoever captures such an animal has the exclusive right to it while in his possession, or until it has become so far domesticated that it has the habit of returning after wandering at large. If, however, it escapes and regains its natural freedom, any other person may rightfully take it who captures or kills it. A mere temporary escape, as where a lion escapes from its cage, may not amount to regaining its natural liberty.

The finder acquires title to personal property abandoned by the owner, or to property that has been lost and never reclaimed. But the former owner must have completely relinquished his ownership, intending to give up all his rights in it before a perfect title will accrue to the finder. (See § 169.)

Accession.—Title by accession is defined as the right to all which one's own property produces, either naturally or artificially. This includes the crops yielded by land; the increase of animals; the uniting of the property of one with the property of another, as when an artist paints a picture on the canvas of another, the whole belongs to the artist, but the other has a claim for the value of the materials. Also by the mixing or confusion of goods, which occurs when one person wilfully mingles his own goods with those of another so that they can not be distinguished from each other. If the mixing was by consent, each has a *pro rata* interest in the entire mass.

Intellectual labor.—Authors, composers, and inventors have the exclusive use and control for a limited time in such personal property as owes its existence or value to their skill and labor. The general doctrine is that one has a proprietary right in the product of his intellectual labor and that this right should be protected by law for the purpose of promoting science, encouraging literature, and stimulating inventions.

A *copyright* is a grant to authors of the exclusive right to possess, use, and dispose of their intellectual productions. This gives the owner the right of making, publishing, and selling, or authorizing others to do so for a period of twenty-eight years, with the privilege of a renewal and extension for a further term of twenty-eight years.

A copyright may be secured for books, periodicals, lectures, sermons, addresses, dramatic and musical compositions, maps, works and reproductions of works of art, drawings, photographs, prints, pictorial illustrations, motion pictures, etc. It is essential that before a valid copyright can be had the work must possess originality, and must not be (1) seditious, (2) libelous, (3) immoral, or (4) blasphemous.

A *patent* is a grant for the exclusive privilege of making, using, and vending, and authorizing others to make, use, and vend an invention for a period of seventeen years. The invention must be a new and useful art, machine, or composition of matter, not before known and used.

A patent, being property, the owner has the right to dispose of it as have the owners of any other species of property. He may assign it in whole or in part, and for any amount of territory. He may give the assignee a right in the patent itself; or he may give a special license with the privilege of making, using, or selling on payment of a royalty. The Courts afford protection for the infringement of a valid patent.

§ 15. (2) **Transfer of property.**—Title to personal property may be acquired by transfer in two general ways: (1) by act of law; (2) by act of the parties.

Transfer of title to personal property by act of law occurs (a) by forfeiture, (b) judgment, (c) intestacy, and (d) insolvency.

(1) *Forfeiture* is a loss of title by the owner as a punishment for crime, a penalty for the violation of law, or a breach of contract. Title by forfeiture is practically obsolete at the present time as a punishment for crime. However, there may be a forfeiture of goods for the evasion of revenue laws, or of shares in a corporation for a failure to pay assessments when due.

(2) *A judgment* is a decision or sentence of law pronounced by a court or other competent tribunal having authority as the result of proceedings instituted for the redress of an injury or the settlement of a controversy. Title to personal property occurs as a result of a decree entered in an action whereby a person becomes entitled to take property belonging to another.

(3) *Intestacy* is the state or condition of a person dying without having made a will, leaving personal property undisposed of. The title is vested in the administrator as a trustee for the purpose of settling the estate, and the property is distributed in accordance with the statute laws of the state where the deceased person resided. (See § 308.)

(4) *A bankrupt's property* is transferred by operation of law to an assignee or trustee who has authority to administer the same for the benefit of the creditors. (See § 63.)

Transfer of title to personal property by act of the parties occurs in a contract of sale which is a transfer of the property in a thing for a money consideration called a price. The transfer may be by an exchange of property, whereby the title in property passes to another in consideration of the receipt by him of other property. Again, it may be in the form of a gift which is the actual, voluntary, and gratuitous transfer of property from one person to another. The gift must be accepted by the person to whom made, but the acceptance is presumed. Then again, the transfer may be in the form of a written instrument designated a Will, which provides for the disposition of property to take effect after the death of the person who made the will.

Aliens may acquire, hold, and transfer personal property in the same manner as our own citizens; and they may bring suits for the recovery of their property when it is unlawfully detained.

QUESTIONS

What is property, and what does it include? Name the two general classes of property. Define real property, also personal property. Make a list of examples of each kind. Give an illustration of how personal property may become real property, and how it may be changed back again.

Do you own any property? What kind is it?

What is a chattel? (If you have access to an unabridged dictionary look up the original meaning of the word.) Make a list of not fewer than five items classified as chattels.

Name the various ways in which property may be acquired.

In what manner is title to property acquired by occupancy? To whom do wild animals belong? Explain the ownership of lost property. (See § 14.)

Define title by accession, and give several illustrations.

When is one entitled to the accession to his property?

How may an author, or inventor, acquire the exclusive right or control over his creations? What is a copyright, and how obtained? What may be copyrighted? What is a patent?

Define forfeiture. When is it applied?

What is meant by intestacy?

How may title in property be transferred by act of the parties? In general, what may the owner of property do with it?

CASE PROBLEMS

Case problem No. 2.—Brown, the owner of a house, engaged Cornell, a plumber, to install a bathtub. Before the tub was placed in the house, what sort of property was it? After it was built in, it became what kind of property?

Case problem No. 3.—Green innocently cut some timber from plaintiff's land. The timber was reasonably worth when cut \$25.00. Green manufactured this timber into barrel hoops worth many times the value of the timber. To whom do the hoops belong? Why? What would be your answer if Green knowingly entered another's land and cut timber and converted it into articles of furniture? (22 Mich. 311.)

Case problem No. 4.—Plaintiff took material to a tailor to have made into a suit of clothes. Who owns the suit? If the tailor used some material of his own in making the suit, would that change the situation any? In what respect does this problem differ from the one above?

Contract is a mutual agreement between two or more competent persons based upon sufficient consideration to do or not to do some thing.

CHAPTER III.

CONTRACTS: THEIR FORMATION, OPERATION, AND TERMINATION.

General Principles.

§ 16. **Introduction.**—Contracts are the basis of all lawful business transactions. Business is but another name for the making and executing of contracts. It may be said that there is no act common to business—either so small or so complex that the rules of law relating to contracts, in some form or other, are not applicable.

Making a contract may be a very informal affair—and most of them are so—or it may be the signing of a formal and formidable legal document. The purchase of a lead pencil or the sale of a battleship is a contract; the employment of a bank cashier or the hiring of a washwoman constitutes a contract; borrowing a dollar or leasing a farm creates a contract; and so on through every phase of commercial activity.

The word *contract*, derived from the Latin (*contractus*, from *con* and *traho*, meaning to draw together; to bind), is the legal term for a bargain or agreement.

Definition.—A contract, then, may be defined as a mutual agreement resulting in an obligation, enforceable at law.

Chief Justice Marshall's definition has often been quoted: "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing." (4 Wheat. 122 (1819).)

It has also been defined as "An agreement voluntarily made upon a good consideration between two or more persons capable of contracting, to do, or forebear to do, some lawful act."

While all contracts are agreements, not all agreements are contracts.—Nor will the law enforce all agreements that persons may enter into. To be enforceable the agreement must contemplate a legal—not social, friendly, or frivolous—obligation, for a breach of which a court will award damages or compel performance; provided always such formalities and essentials as the law may prescribe have been complied with. The following incident will illustrate this point:

Defendant gave his check for \$300.00 to the plaintiff for an old watch worth \$15.00. The plaintiff presented the check to the bank for payment and it was not paid; he then brought suit against the defendant. It appeared the whole transaction was a frolic and banter, the plaintiff not expecting to sell, nor the defendant intending to buy the watch at the sum for which the check was drawn. Accordingly, the court dismissed the suit since neither party intended a legal obligation, (11 Mich. 248.)

The words *enforceable at law* mean that the contract is legally binding and the law may be invoked to enforce it. Courts will take no notice of the violation of social courtesies.

Brown invited Black to be his guest at a theatrical performance, and Black accepted the invitation. Brown purchased the tickets, but Black failed to keep his appointment. This was an agreement, but not a contract. It contemplated not a legal obligation, but a social engagement.

If one should lend another money for the purpose of engaging in an unlawful transaction (for instance, to bet on an election), the money could not be recovered.

§ 17. **Kinds of contracts.**—For convenience, contracts may be divided into two general classes, namely:

First. Simple or parol contract.

Second. Specialty.

(1) A *simple or parol contract* is one not under seal. This is the most common form, and the great majority of contracts are of this character. Parol contracts are either:

First. Express or implied.

Second. Written or oral.

Third. Executed or executory.

(a) An *express contract* is a contract definite in all of its terms and conditions, whether in writing, by word of mouth (oral), or by signs; as, the nodding of the head in an auction, the purchase of a book, or the hiring of a clerk at an agreed price.

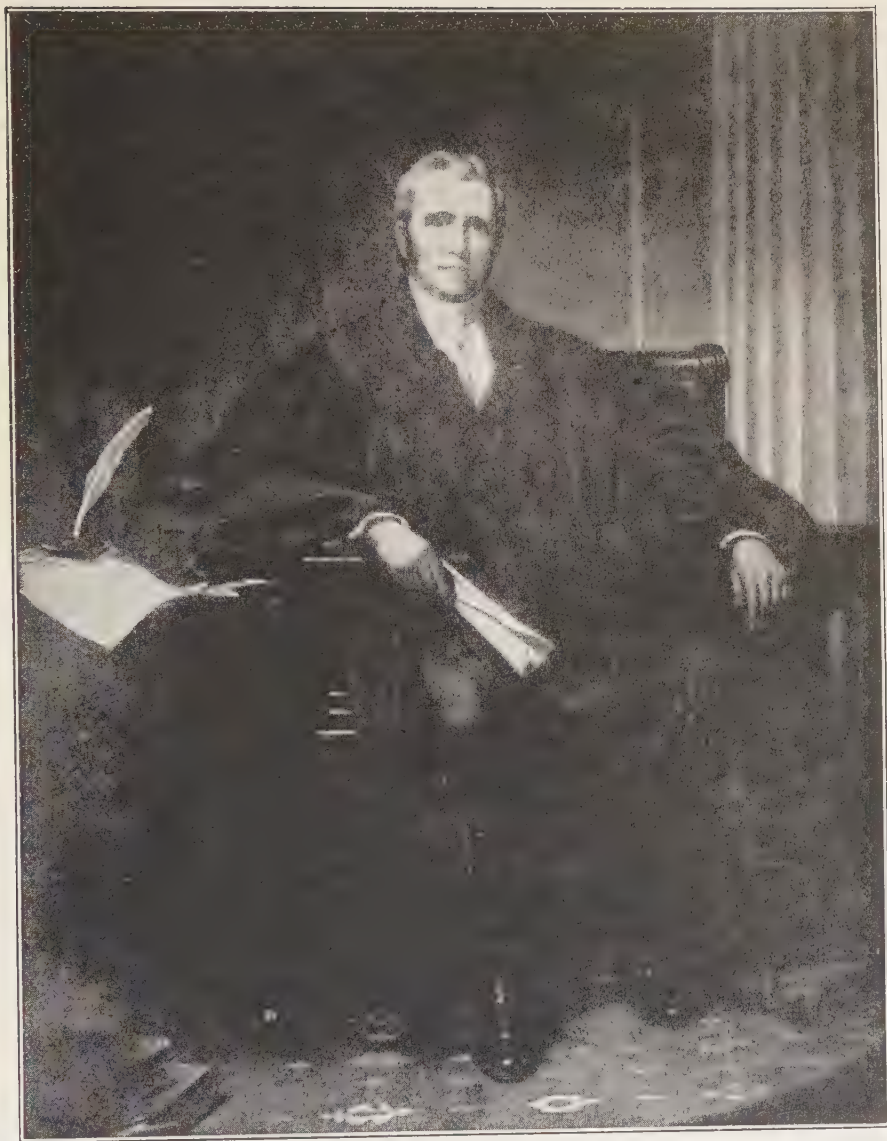
(b) An *implied contract* is one the law will infer from the acts of the parties indicating a mutual intention to contract. If one enters a restaurant and eats a meal, it is implied that he will pay the ordinary price for it.

(c) *Written contracts* are those in which the conditions, terms, and other essentials are in writing. The writing need not be a formal instrument, but may consist of letters, telegrams, or other related memoranda. There are certain contracts (to be considered later)¹ which, to be enforceable, must be in writing. Written contracts prevent misunderstanding. They are a safeguard against inaccuracies, misrepresentations, and false evidence; but care must be exercised in their execution, for when a contract is reduced to writing it is presumed to cover everything pertaining to the agreement.

(d) An *oral contract* is one expressed in spoken words. In the absence of a statute requiring it to be in writing, it is as enforceable as a written agreement, but may be more difficult to prove.

(e) An *executed contract* is one which has been fully performed or completed so that nothing remains to be done; as, a paid note.

¹ See §§ 44 and 45.



JOHN MARSHALL,
CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT, AND
EXPOUNDER OF THE CONSTITUTION.

[over]

JOHN MARSHALL,

SOLDIER, STATESMAN, LAWYER, PATRIOT, AND JURIST.

"He was one of those to whom centuries alone give birth; standing out like beacon lights on the loftiest eminence to guide, admonish and instruct future generations, as well as the present."—Justice Story, 1835.

John Marshall was born in Germantown, Virginia, in 1755 and died in Philadelphia in 1835. He was an officer in the Colonial army from 1775 to 1779, where he won distinction as judge advocate in courts-martial. His chief distinction is as Chief Justice of the United States Supreme Court, which position he held for thirty-four years. His interpretations of the Constitution have long been recognized as "an important and permanent feature of American law." His decisions on constitutional questions established precedents that have been accepted ever since. He held that "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . . A legislative act contrary to the Constitution is not law." (*Marbury versus Madison*, 1 Cranch, 176.)

(f) *An executory contract* is one in which the conditions are not yet performed; as, an unpaid note. It is an agreement to do or not to do a particular thing. Every contract is or has been an executory one.

If the conditions of the agreement have been performed by only one of the parties, it is executed as to him, but is executory to the other. Smith sold and delivered to Jones a wagon, but Jones has not paid for it. The contract is executed as to Smith, but executory as to Jones.

(2) *A specialty* is a contract under seal, as a deed, mortgage, bond, and the like. To be effective, it must be in writing, signed, sealed and delivered.

A contract under seal is one that has a seal in connection with the signature, and under the common law no other consideration is necessary. Originally a seal was an impression on wax, but now when required it may consist of a small wafer or scroll, or an imitation thereof made with a pen, as:



Private seals have been abolished or their value greatly modified in most of the states.

The use of the seal is of remote antiquity. Seals are mentioned several times in the Bible.¹ During the middle ages there was a revival in their use as a substitute for signatures; and they were considered the main proof of the authenticity of all sorts of documents, both public and private. These documents were sealed by dropping molten wax or other tenacious substance on the parchment and making an imprint of the seal thereon.

The die consisted of whatever device suited the fancy of the person adopting it. It was usually engraved on a ring, that it might accompany the owner and be ready for instant use, and also for greater security in preventing its illicit use by unscrupulous persons.

§ 18. **Validity.**—Contracts, as to their validity, may be classified as, (a) void, (b) voidable, and (c) valid.

(a) *A void contract* is one that has no force or effect whatever, being wholly unenforceable and destitute of legal effect. An agreement to do an unlawful act would be void.

(b) *A voidable contract* is one that may be affirmed or rejected at the option of one of the parties, but which is enforceable against the other, at the election of the former. Hence, a void-

¹ Kings xxi, 8; Daniel vi, 17; Jeremiah xxxii 10, 11, 14, 44.

able contract is not necessarily void, but may be made void under certain circumstances.

Contracts made with persons not of lawful age are voidable. A minor may affirm or reject the agreement so far as he is concerned, but the person competent to contract will be bound by it. Until the contract is avoided it will be good and binding.

(c) *A valid contract* is one that contains all the essential elements required by law and is unqualifiedly enforceable.

§ 19. **Essential elements.**—The following elements are indispensable and must be present in every contract to make it valid (binding):

First. Parties legally capable of contracting.

Second. Mutual agreement.

Third. Legal object.

Fourth. Valuable consideration.

Fifth. Required form, in some instances.

QUESTIONS

What is a contract? What is an agreement? Are all contracts agreements? Why are not all agreements contracts? What is the difference between a contract and a promise?

Consult a reference book for the meaning of (1) compact; (2) covenant; (3) obligation; (4) bargain; (5) indenture; (6) protocol; (7) stipulation; (8) treaty; (9) engagement; (10) settlement, and show where each differs from the technical meaning of a contract.

Make a list of five or more business transactions constituting a contract.

What is meant by the term enforceable at law?

Explain what is meant by a simple or parol contract. In what respect does such a contract differ from a specialty contract?

Illustrate by example the difference between an express and an implied contract. What is an executed contract?

State some of the most important advantages of a written contract.

What is a seal? Originally how was it made, and how is it now made?

Are private seals required in your state?

Some contracts are said to be void, others voidable. Explain the difference.

What is a valid contract? Name the essential elements which must be present in every contract to make it valid.

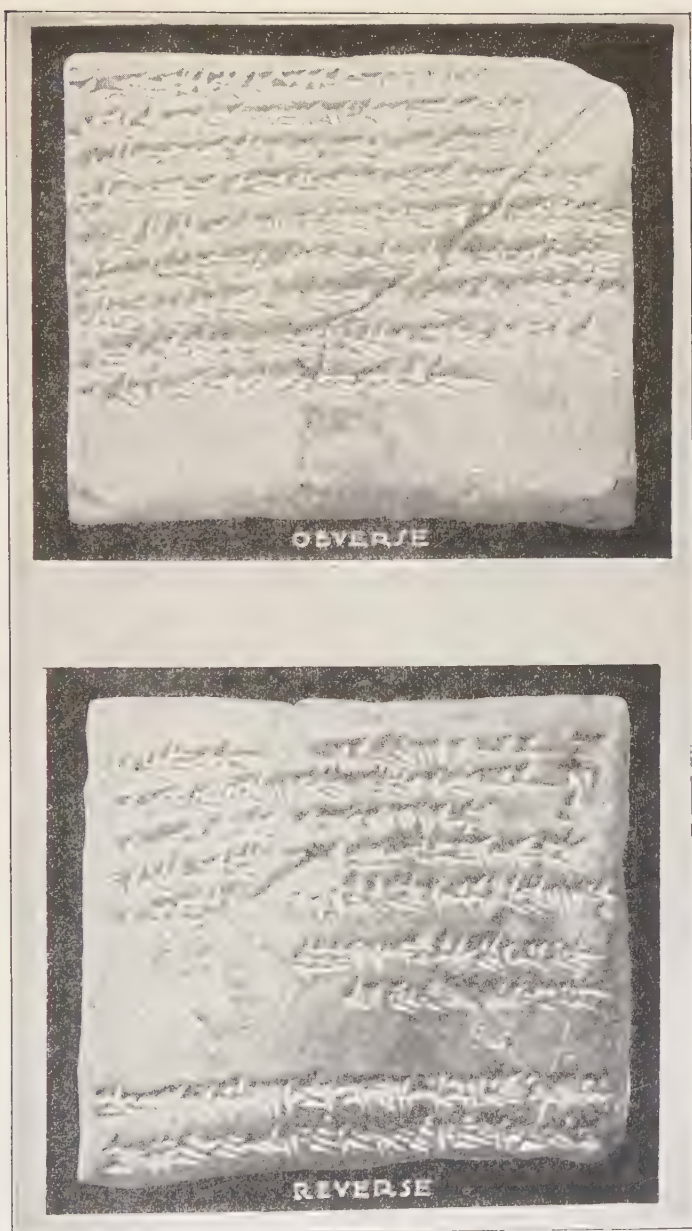
CASE PROBLEMS

Case problem No. 5.—Richard Roe, a retail coal dealer, in a bantering and bluffing spirit, proposed to sell to John Wright 10,000 tons of coal at \$3.00 per ton, which was \$1.00 under the market price. This agreement was put in writing and Roe signed it. He afterward sought to avoid liability on the ground that it was never intended by either party to be a sale, but was purely a bluff or banter and without serious intent. Wright brought suit to recover damages, contending that it was a bargain seriously made. What, in your opinion, ought the decision in the case be? (Keller v. Holderman, 11 Mich. 248.)

Case problem No. 6.—(1) If A agrees to sell and B agrees to buy 50 barrels of flour at a fixed price and at a particular time—is this an express or implied contract?

(2) If A failed to perform fully his part of the agreement by delivering only 49 of the 50 barrels, can A in a suit recover payment for what he had delivered, and how much would he be entitled to collect? Would such a suit be based upon an express or an implied contract?

Case problem No. 7.—John Doe agreed to pay plaintiff \$100 if he would set fire to Smith's garage. Will Doe be compelled to pay the money? If the money was paid in advance can it be recovered? What principle of law is violated?



AN ANCIENT BABYLONIAN CONTRACT.

AN ANCIENT BABYLONIAN CONTRACT.

The illustration depicts a contract made in the reign of King Artaxerxes (464-424 B. C.), more than 2300 years ago. It was inscribed on a baked brick dug up in the ruins of the ancient City of Nippur, Babylon.

The following is an accurate translation of the contract:

"Bel-ah-iddina and Belshunu, sons of Bel- — and Hatin, son of Bazuzu, spoke unto Bel-nadin-shumu, son of Murashu, thus: As concerns the gold ring set with an emerald, we guarantee that for twenty years the emerald will not fall out of the gold ring. If the emerald should fall out of the gold ring before the end of twenty years, Bel-ah-iddina, Belshunu, and Hatin shall pay unto Bel-nadin-shumu an indemnity of ten mana of silver. Thumb-nail mark¹ of Bel-ah-iddina, Belshunu and Hatin instead of their seal."

¹ Line 15.

CHAPTER IV.

PARTIES COMPETENT TO CONTRACT.

§ 20. **Required numbers.**—To every agreement there must be at least two parties, the one who is bound to perform the contract and the other who is entitled to have it performed. The familiar saying, "It takes two to make a bargain," is good law. Each of these parties may consist of one or a number of persons, as an individual, a partnership, or a corporation.

§ 21. **Competency.**—By competency is meant the legal and mental capacity to make an enforceable contract. There are a few persons whom the common law, for their protection or on the ground of public policy, regards as incapable—to a greater or less degree—of binding themselves by an enforceable obligation; all others are competent. Among the former may be classified:

First. Infants.

Second. Insane persons.

Third. Drunkards.

Fourth. Married women.

§ 22. (1) **Infants.**—In law, all persons under the age of twenty-one are infants, or as generally styled, minors. In some states women become of age upon completing their eighteenth year and in a few other states at a younger age, if married.

Under the common law, a person is of full age at the beginning of the day preceding his twenty-first birthday anniversary, that is, the last day of his twenty-first year. The fraction of a day is not regarded in law, except in those cases imperatively required by justice. Applying this rule, it is possible for a person to attain his majority almost two days before he is actually twenty-one years of age.

A man born the first day of February, in the year 1600, on the last second before midnight, was adjudged to be of full age on the first second after midnight on the last day of January 1621, with full power to do anything thereafter that any person of legal age might do.

In law it is the same whether a thing is done at one moment of the day or at another. (Sharswood's Bla. Book 1, p. 463.)

The age of twenty-one has been arbitrarily fixed upon as the time when the average person is competent to contract intelligently. Hence, it is the duty of every person to inform himself concerning the age of the one with whom he is dealing and guide himself accordingly.

The selection of this age is supposed to have originated in the feudal system which regarded the subject as physically fit at that age, if a male, of doing Knight service, and following his Lord to the wars. Before that age the female was not considered of suitable age to marry one upon whom would fall these duties.

Under the statutes of some jurisdictions, an infant or minor may be granted the rights of a person of legal age, although he has not reached the age fixed by law for his majority. The conferring of such a right is called *emancipation*, and this emancipation partially removes the disability of infancy.

When an infant has been emancipated by the father relinquishing his custody and refusing to support and maintain him, the infant may receive his own earnings, but this does not enlarge or increase his capacity to make contracts. A daughter is emancipated by marriage.

The privilege of infancy is a personal privilege, of which no one can take advantage but the minor himself. It is a legal shield thrown around him for protection against the wrongful designs of persons of mature years and larger experience. Hence, contracts that are beneficial to the infant are voidable at his option, but are binding on a person of full age. Nor will one be protected who, ignorant of that fact, makes a contract with a minor.

Exceptions.—There are a few exceptions to the rule that the contracts of minors are voidable; these exceptions are classified as necessities, “since an infant must live as well as a man.”

Necessaries.—A minor is legally liable for the actual value of necessities furnished him. Necessaries include those things reasonably needful for maintaining one properly according to his age, rank and fortune. They must be actual necessities and not luxuries or mere ornaments. These requirements include not only food, clothing and lodging, but also medical and educational needs. It has been held that instruction in singing and dancing are not included in the list of necessities. If the minor has a family, his liability for necessities will extend to them. If he is living with his parents or guardian, his own contracts are not binding. Under the common law the father had absolute control over the person and property of his minor children until they attained their majority.

An infant's agreement to marry is voidable like all other executory contracts, but if the agreement is executed then he will be bound by it. After marriage the contracts of an infant for the support of his wife will be as binding as for his own necessities.

Ratification.—The voidable contracts of a minor may be ratified by him upon reaching his majority, in which case both parties will be bound. If the act is not repudiated before he becomes of age or within a reasonable time thereafter, it will be held to have been confirmed. The minor can not ratify a part and reject a part, but must ratify or repudiate the whole agreement.

If a contract is once ratified by a former infant after he has attained his majority, he can not later disaffirm it; nor can he ratify a contract he had previously disaffirmed. Of course, there

is nothing to prevent the parties entering into a new contract covering the same subject-matter, if they so desire. The disaffirmance must be by some definite act or statement. If a suit is brought against the infant his plea of infancy will be notice of disaffirmance.

When a minor repudiates his contract, he must return any money or property still in his possession, which he may have received under the contract. But if he has spent the money or lost the property, he can not, of course, be held liable for it.

A minor is liable for injuries to property or to persons wrongfully committed by him. If he obtains possession of property fraudulently, he will be held liable for his wrongful act. If he pretends to buy something, but does not intend at the time to pay for it, there is no contract between the minor and the seller. If a minor hires a horse, and deliberately injures it, or uses it for another purpose than that for which he hires it, he will be held liable for damages.

Before the age of seven, a child is held incapable of committing a crime. Between the ages of seven and fourteen (in nearly all of the states) his capability to commit a crime must be clearly proved. After fourteen he will be held responsible, unless he can prove his incapability.

§ 23. **Insane persons, idiots, and inebriates.**—Insanity is a term used to describe the condition of a person whose mind is unsound or deranged, and includes lunacy, idiocy, senile dementia, kleptomania, monomania, and other mental derangements of like character. An idiot is one who has had no mind from his birth.

There is a conflict among authorities as to the liability of insane persons for their contracts. It is generally held that a contract made with a person mentally incompetent to contract is not binding upon him. Since such person has no mind, he can not concur in making an agreement with another. Every contract is founded upon the free and voluntary consent of each of the parties. Therefore a lunatic or an idiot is incompetent to make an enforceable contract, except for necessities. In this respect his liability is the same as that of a minor; that is, his contracts are voidable. But a mere weakness of mind does not incapacitate a person from contracting or excuse him from performing, particularly when the agreement is not tainted with fraud.

There is a tendency to hold persons of unsound mind liable if the transaction is fair and reasonable, and was made without the other party's having a knowledge of the lack of mental capacity. It is well known that a person may be insane upon some one subject and quite sane upon all others. Such persons may make thrifty bargains without betraying their mental infirmity. It is reasonable that they should not be permitted to obtain and retain property without paying for it. The insane person has incurred no loss, and why should the other party suffer, having done no wrong?

If an insane person recovers his reason, he may ratify or disaffirm any contract made by him while insane. If he elects to disaffirm, he must return whatever property he received that is still in his possession. Acts done during lucid intervals are perfectly valid at all times.

All persons are presumed to be sane until proved otherwise. One suspected of insanity may be brought before a judicial tribunal where the mental capacity will be legally determined.

Such a proceeding is constructive notice to all concerned if the one tried should be adjudged insane. In many of the states the contracts of those who have been judicially declared insane are absolutely void.

Drunkenness is a temporary disability voluntarily produced. "Insanity is a misfortune; drunkenness is a vice." Persons who are in such a state of intoxication as to be unable to realize their acts may void their contracts made while in such condition; in such a case there can be none of that mutuality which is essential in order to make a valid and binding contract. If the act is ratified afterward when the contracting party is sober, it will be binding. If an intoxicated person signs a contract he has agreed to make when sober, his intoxication will not excuse him from his performance. Likewise the contract of a habitual drunkard will be binding, if made during a sober interval. To be relieved from liability on the ground of intoxication, the person must have been so drunk that he could not exercise his judgment; his reason must have been suspended.

Intoxication is a legal excuse for avoiding a contract, but not for the commission of a crime.

§ 24. **Married women.**—Under the common law a married woman had fewer rights in matters of a contract than a minor, for as has been shown, the agreements of a minor are for the most part only voidable, while those of a married woman were as a general rule absolutely void. However, this disability has been largely, if not entirely, removed by statutes in nearly all of the states, and married women may now contract and be contracted with as fully and freely as any other person.

Historically, the common-law rights of married women are of much interest. In early times and among primitive people of the present time, the wife was and is the property of the husband, to do with as he may desire, and was acquired by gift, purchase, capture, or barter. For are we not informed that Adam gave a rib for his wife?

Under the common law of England, the husband and wife are considered one person—and that person is the husband. The legal existence of the wife was suspended, or at least incorporated and consolidated during marriage into that of her husband under whose wing and protection only was she permitted to do any legal act.

All the personal property owned by the wife, her money, her goods, and her chattels became at once on her marriage the absolute property of the husband to do with as he pleased, even to giving it away during his life or leaving it to others by a will at his death.

Under modern statute a husband is required to pay all debts contracted by his wife unless he has given due notice, either by letter or publication in the

newspaper, to the effect that he will not be held responsible. The husband is required by law to provide his wife with the necessities of life, and if he fails to do this, will be held responsible for the payment of debts created for the purchase of these necessities, even though he may have given due notice to the effect that he will not be responsible for her debts.

QUESTIONS

Define competency as applied to persons capable of making contracts. Name those whom the law declares to be incompetent. Is a person born deaf and dumb incompetent to make a contract?

Consult a glossary or dictionary for the meaning of (1) emancipation; (2) repudiation; (3) ratification; (4) lunacy; (5) insanity; (6) legal; (7) infant; (8) minor; (9) drunkard; (10) inebriate.

Who are infants, or minors in law? When does legal infancy end?

Are the contracts of a minor binding? Why? If an adult makes a promise to a minor, is the former bound by it? Is the infant? What is said to be the legal capacity of a minor?

What is an infant's liability for necessities? It is said that the term **necessaries** is a purely relative one. Explain the meaning of relative as thus used. Is clothing a "necessity?" Explain under what circumstances a person might not need a suit of clothes.

Write a list of articles that would be deemed necessary for (1) a boy sixteen years old (a) whose father is a day laborer; and (b) whose father is a bank president; (2) for a girl fifteen years old (a) whose mother is a widow with three other children to support on an income of \$500, and (b) the only daughter of a widow who has a large income.

How may an infant ratify his contracts? May this right be exercised for him by another? What is the difference in meaning of **ratify** and **confirm**?

Is an adult bound by his contract with an infant regardless of whether the infant is or is not bound? To what extent is the adult liable?

What is the liability of insane persons and drunkards under contracts made by them? Who are drunken persons?

What is the legal effect of drunkenness in the commission of a crime?

What do you understand is the meaning of being adjudged insane?

How can you know whether a person is insane? What is the meaning of a "lucid interval?" Are contracts made at such times binding?

What is the common law capacity of married women to make contracts? Compare the rights of a married woman with those of a minor in regard to making contracts; also with an unmarried woman. What are the rights of a married woman to contract under the statute law of your state?

What right has a married woman to pledge the credit of her husband in the purchase of those things with which she is reasonably supplied? Is the husband liable for necessities furnished his wife by a merchant, if the wife has deserted her husband without just cause?

What is the difference between the obligation of the father to the child and the husband to the wife?

CASE PROBLEMS

Case problem No. 8.—John Henry Smith was born ten minutes after 12 o'clock midnight, on the first day of January in the year 1900. When will he be of full legal age? (3 Del. 557.)

Case problem No. 9.—A young man twenty years of age entered into an agreement with the Sunshine Supply Co. to act as bookkeeper for three years. At the end of six months he resigned without the permission of his employer. The company refused to pay the salary in arrears, claiming it suffered damages from a breach of contract, exceeding the amount due. Can the young man

collect the salary due for the services he has rendered? (*Derocker v. Continental Mills*, 58 Mass. 217.)

Case problem No. 10.—William Henry Brown, a minor, while away from home, became ill, and engaged the services of a physician. Can the physician collect for his services from the boy's father?

Case problem No. 11.—Pat Rooney traded horses with a minor. The minor used the horse he received in the trade until it became "poor," while the horse he disposed of was placed in a pasture until it became fat. Can the minor compel Rooney to trade back? If the minor received "boot" money must he return this money in case they trade back?

Case problem No. 12.—A merchant extended credit to John Brown, who in all appearances was perfectly sane. It afterward developed that the said Brown had been adjudged insane. Can the merchant collect the amount of the credit extended?

Case problem No. 13.—A. C. Brown contracted for one year at a salary of \$100.00 per month. Before the expiration of the contract Brown while drunk agreed to a reduction in his salary of \$25.00 per month. What salary can Brown collect per month after making this new agreement?

Case problem No. 14.—A merchant extended credit to John Allen, while slightly intoxicated, for clothing. Can he collect from Allen for the amount of the credit extended?

Case problem No. 15.—The defendant, while a minor, bought a horse and plow. He gave a note in payment. After he became of age he sold the horse but kept the plow. He resists paying the note on the ground that when he gave it he was a minor. In this case is that a good defense? Why? (9 Mass. 519.)

Case problem No. 16.—McCarthy bought goods at an auction conducted by the Bowling Green Storage Co. At the time McCarthy was insane, but had not been judicially declared so. He was afterwards declared insane and his guardian desires to have the sale declared void. Result? (182 App. Div. N. Y. 18.)

CHAPTER V.

MUTUAL ASSENT.

§ 25. **Agreement.**—The basis of all legal contracts is agreement, without which there can be no contract. In law, agreement means the meeting of the minds of both parties in agreeing to exactly the same thing in the same sense; in having in mind the same terms, conditions, and subject-matter in making a contract.

§ 26. **Offer and acceptance.**—An agreement is composed of two elements, an offer and an acceptance.

(1) *An offer* is a proposal by one party, called the offerer, of what may be accepted or rejected at the option of the other party.

(2) *An acceptance* is the assent by the other party, called the offeree, of his willingness to do or not to do that which was proposed.

Offer; how made.—The offer must be communicated. This may be by words or acts. If by words, they may be written or oral; no particular form is necessary. The offer need not be made to any particular or definite person; it may be made to all the world, any one of whom may accept it.

An automatic vending machine is an offer on the part of the owner of the machine to supply articles in return for the act of placing a coin in the machine. The display of merchandise by a merchant is an offer to sell the merchandise at the price mentioned in the display or at an agreed price if no price is mentioned. An advertisement in a newspaper or circular letter is not regarded as an offer, but merely as an invitation to trade.

Offer; how recalled.—An offer may be recalled any time before it is accepted. If the offer is recalled it must be before there is an acceptance, and notice of the withdrawal must be communicated to the one to whom the offer is made. If there is no fixed time for acceptance, the offer is presumed to remain open for a reasonable time. If the offerer receives something as a consideration for holding the offer open for a fixed time, it can not be withdrawn before the expiration of that time. The death or insanity of the one making the offer will act as a revocation.

Reward.—An offer to pay a reward for the performance of any service is an offer, and anyone who complies with the terms of the offer may receive the reward. The service must be rendered with the full knowledge of the offer and with reliance upon it,

otherwise no claim can be made for the reward. The offer of a reward is not of itself a contract, and may be revoked at any time before it has been acted upon. After it has been complied with, it becomes a contract obligation.

Defendant published a notice offering a reward of \$700 to any person or persons giving information leading to the arrest and conviction of a murderer. The plaintiff gave information leading to the arrest before he knew a reward had been offered. The court held that the plaintiff could not recover the reward since it appeared he had not acted in any sense in reliance thereon. (38 N. Y. 248.)

Acceptance.—The acceptance must be unconditional and identical with the offer. The agreement is not completed until there is an acceptance by some specific individual, which must be made known to the offerer by some word or act. In law, silence does not give consent; there must be speech or action; a mental determination to accept is not sufficient. The nodding of the head or shaking hands in response to an offer will constitute an acceptance.

If the offeree changes, varies, or qualifies the proposition in any manner, his acceptance becomes a counter offer subject to approval or rejection by the original offerer. A counter offer acts as a revocation of the preceding offer, and is equivalent to its rejection.

A man standing in front of a burning building shouted, "I will give five thousand dollars to any person who will bring the body of my wife out of that building dead or alive." This was an offer, and its acceptance was completed when one of the crowd entered the building and brought out the woman. (42 Am. Rep. 731.)

§ 27. **Contracts by correspondence.**—An offer to contract may be made in person, by an agent, by letter, or by telegraph; the acceptance of it may be given in the same manner. If a person by correspondence proposes to bind himself by contract and states the terms and conditions, the party to whom the proposition is made must, within a reasonable time after the receipt of the proposal, accept it as made, if he wishes to become a party to the agreement.

If the offer is made by letter or telegram, the offerer may recall it by a subsequent communication, provided it reaches the offeree before an acceptance has been written and posted.

As soon as an acceptance is placed in the mail it is a contract, the acceptor having done what was required of him to close the offer. The acceptance takes effect from the time of mailing the letter and not from the time of its receipt. On the other hand, a withdrawal of an offer by mail takes effect when the letter of revocation is received by the offeree and not at the time it is placed in the mails by the offerer. The posting of the letter or the sending of the telegram must be such as to place it beyond the control of the sender.

Brown in Chicago sent a letter on Tuesday to Smith in Chattanooga, offering to sell a carload of produce at a certain price. This letter was delivered to Smith at noon on Wednesday. Wednesday morning Brown mailed Smith a letter withdrawing his offer made the day previous. This last letter was delivered to Smith at noon Thursday while he was in the act of writing a letter of acceptance. This was a legal recall of the offer and Smith could not accept.

If the offerer requires that the acceptance be made in a particular manner, it must be so made in order to constitute a contract. The person making the offer may require that the acceptance be actually received by him and within some definite time. In such a case, if the offeree sends an acceptance which fails to reach the one making the offer, there will be no contract. One can not make an offer and stipulate that if he does not receive an answer, he will consider it an acceptance. No person can be compelled to speak or write.

When an offer is made by mail or telegraph, the means used for communicating the proposition is the agent of the one making the offer. If an error occurs in the transmission, the offerer will be bound, if the offeree complied with its terms in accepting it. The one making the offer must sue the telegraph company for the damages, since he must be the party responsible for the agency selected by him.

QUESTIONS

How many parties are there to a contract? Each party may consist of how many persons? Can one person make a contract with himself? Can he sue himself?

Define (1) mutual; (2) cancel; (3) annul; (4) offeree; (5) acceptance; (6) option; (7) assent. How do contracts originate? How must an offer be made?

What is a counter-offer, and what is its effect on a preceding offer?

Is an advertisement in a newspaper offering Panama hats for sale at 15 cents each an offer? A city treasurer advertised for bids to furnish the city with certain supplies. Is the advertisement an offer? A hat in a show window of a department store is marked ten dollars. Is this an offer? Make a list of five or more offers and explain how they may be accepted. Of what does **assent** consist? In what ways may it be given? What act will constitute both an offer and an acceptance?

May an offer be accepted by the doing of an act? Explain fully. Does the mental acceptance of a proposal constitute a contract? How must the acceptance be communicated?

How long a time does one have in which to accept an offer? What is meant by giving an option?

If the postman delivers a letter containing an acceptance of an offer to the wrong house, have the minds of the parties met, and is it a contract?

Does the use of a particular medium of transmission by the offeror impliedly direct its use by the offeree? If an acceptance is sent by any other manner than that authorized by the offeror, when is the contract completed?

Give several illustrations of business proposals not intended to be offers.

State several ways in which an offer may terminate.

CASE PROBLEMS

Case problem No. 17.—Plaintiff wrote Defendant inquiring of him whether he owned certain lots, and if so what was the price. Defendant answered in the affirmative and named the price. Would this be considered equivalent to an offer to sell the lots?

Case problem No. 18.—White writes Black, "I will give you \$100.00 to build a No. 10 frame garage on my lot," and Black answers, "I accept." Would this be a contract?

Case problem No. 19.—Uriah Hoop subscribed for a monthly magazine for one year. At the expiration of the year he neither renewed his subscription nor notified the publishers to discontinue the magazine. The publishers sent it for another year, and Uriah received and read it regularly—let us hope with pleasure and profit. At the end of the second year the publishers demanded the price for the second year. Uriah refused to pay. Can the publishers of the magazine recover the amount they claim due? (44 N. H. 115.)

Case problem No. 20.—Dickens inserted an advertisement in a daily paper for one week. The publisher continued to print the advertisement for one month after the time specified for publication had expired. Is Dickens liable for payment? In what respect does this example compare with the one above? In what respect does it differ?

Case problem No. 21.—Green writes to Brown and offers to buy Brown's horse for \$300.00. Brown makes up his mind to accept, but never tells Green of his intention to do so. What remedy does Brown have if Green buys a horse elsewhere?

Case problem No. 22.—A merchant wrote to a carpenter asking the latter to make certain office fixtures, offering to pay a specified price therefor, if he would begin at once and have the work completed within two weeks. The carpenter did not answer the letter, but immediately purchased the necessary lumber and other material and began the work on the same in his own shop. The merchant thereafter wrote to the carpenter countermanning the order. On receiving this last letter the carpenter brought suit for breach of the contract. In this particular case was there a contract and can the carpenter recover? Did the buying of the lumber and the beginning of the work indicate an acceptance of the proposal? (46 N. Y. 467.)

Case problem No. 23.—Summers, a merchant, shipped Brown, a farmer, certain merchandise and mailed Brown an invoice. Must Brown accept and pay for this merchandise if he did not order it? If he does accept it, can Summers collect?

Case problem No. 24.—Morgan wrote to Millet offering to buy the latter's house, located at 101 Broadway, for \$10,000.00. Morgan signed the letter and also wrote at the bottom of the letter "Over." On the other side of the paper he said his offer was conditional upon Millet's accepting as part payment a house at Fifth and Main Streets, at a valuation of \$4,000.00. Millet, in a hurry to close the deal, failed to read what was on the back of the letter, and wrote accepting the offer. Did their minds meet in contract?

Case problem No. 25.—Hess offered to sell his automobile to Shafer for \$200.00, and gave him a week in which to decide. The next day, and before Shafer accepted, Hess withdrew his offer and sold to another for \$300.00. What, if any, is the liability of Hess?

Case problem No. 26.—On the evening of November 11, Lucas received a letter from Sass offering to exchange certain real estate. Sass said: "I will have to know at once as I have another deal pending. At 9:10 a. m. on the following day Lucas replied by telegram accepting the offer but the telegraph company did not send the message until 4:41 p. m. and Sass did not receive it until 6:03 p. m. In the meantime Sass sold the property at 3:30 p. m. to another party. He also wrote Lucas that, not hearing from him, he had decided Lucas did not want the property. Lucas sued the telegraph company for its negligent delay. (131 Iowa Reports 669.)

CHAPTER VI.

REALITY OF CONSENT.

§ 28. **Their agreement.**—One of the indispensable elements of an agreement is the “meeting of the minds” of the parties, without which there can be no contract. The reality of consent necessary to make a true agreement is missing if the contract is based upon any one of the following various causes, showing a lack of genuine consent:

First. Mistake.

Second. Fraud.

Third. Duress

Fourth. Undue influence.

§ 29. (1) *Mistake.*—An agreement entered into through a mutual mistake is voidable. The mistake may be as to the identity of persons and things, but if it is regarding the value or quality of the subject-matter the agreement is not *void*. If an agreement is entered into concerning something which, unknown to both parties, is not in existence at the time, there is no contract since there is no subject-matter. Or, if one of the parties offers one thing, and the other expresses his assent to another, there is no contract, for the minds of the parties have not met.

Smith offers to sell his horse to Brown for \$175.00. The latter, understanding the price to be \$75.00, takes the horse. Here is a mutual mistake; their minds did not meet, consequently it would not be a sale.

Plaintiff found a small stone and sold it for one dollar to the defendant. It afterwards developed that the stone was a rough diamond worth \$700.00. At the time of the sale both parties were unaware of the character of the stone or its true value. The sale was held to be a valid one. (66 Mich. 568.)

Peter Sterling bought a specific piece of jewelry that he believed was of ancient workmanship, while in truth it was very modern. He made the purchase upon his own reliance. This was a contract.

A person has the right to select and determine with whom he will contract, and another person can not be substituted without the first party's consent. The Boston Ice Company supplied Mr. Potter with ice. For some reason or other he decided he wanted another ice man. Thereupon, Mr. Potter discontinued doing business with the Boston Ice Company and made a contract with The Citizen's Ice Company to furnish him with ice for the season. Soon after, however, The Citizen's Ice Company sold its business to the Boston Ice Company, and the latter named company resumed delivering ice to the residence of Mr. Potter, who was ignorant of the change made until after the consumption of the ice delivered. It was held that the Boston Ice Company could not recover the price of the ice delivered. (123 Mass. 28.)

§ 30. (2) *Fraud.*—A person who deceives another in making a contract is guilty of a fraud, and a fraudulent contract is void—

able so far as the innocent party is concerned. It is against the spirit and policy of the law to permit the defrauding party to profit from his own wrong. To constitute fraud so that redress may be attained, it must be shown:

First. That there was a false representation of a material fact;

Second. That the person who made the representation knew it was false (or made it recklessly without regard to its truth or falsity);

Third. That it was made with the intention of influencing and actually inducing another to act upon it; and,

Fourth. That the person thus acting was damaged.

"Fraud consists in the employment of any kind of cunning, deception, artifice, or concealment to cheat, circumvent, or deceive another in a business matter."

It is not necessary that the misrepresentation be in words. Acts and devices which create in the mind of the other party a mistaken belief in regard to the facts may effect the same result.

The injured party may rescind the contract by returning the property and recover the money paid, or he may keep the property and recover damages for the injury. If both parties are equally guilty, the law will not assist either one of them. An innocent person can not take any action until he has been injured. One who indorses a note before maturity under a false representation can not recover damages until he has been compelled to pay the note.

Since contracts affected by fraud are voidable, not void, it is only the defrauded party who can avoid the contract, while the other party is bound. If a party fraudulently acquires the property of another and sells it to an innocent purchaser, before the vendor disaffirms the contract, the buyer will get a good title. If a fraudulent contract were void the result would be different; the buyer would not have title.

Defendant sold to the plaintiff a horse for \$200.00. The former to induce the latter to buy said the horse was sound, while in truth he had a disease which caused him to be worthless. The defendant made the representation for the purpose of inducing the plaintiff to buy and the latter bought on the strength of the seller's false statements. This was a fraudulent contract. (90 Pa. St. 250.)

If the plaintiff and the defendant had met on equal terms, each having the same means of information, and the defendant did not conceal any defects, there is no fraud. The law will not give indemnity to those who are indolent or careless in obtaining information, nor is the vendor under obligation to point out defects which anyone may see if he will look.

If the misrepresentation consists in a matter of opinion or expression of intention, it will not invalidate a contract. A representation by a seller that the property offered for sale is worth a given sum is an expression of opinion and not the representation of a fact. A statement as to the cost of an article may be

made under such circumstances as will justify the buyer relying on it as a statement of fact. One wishing to rely on statements should have them put in the form of warranties by the party making them.

§ 31. (3) *Duress*.—Contracts to be binding must be entered into willingly and legally. If one party compels another by means of threats or actual violence to enter into an agreement, it is said to be obtained under duress. It is evident that there is no real consent to contracts obtained in that manner. The party who gives his consent under such circumstances may avoid the agreement at his election. The duress may consist of either actual or threatened violence or imprisonment; it may be to the person of the party or any member of his family.

A note extorted from a father whose son was a defaulter, in consequence of threats to prosecute the latter for embezzlement, was held to be void since it was obtained under duress.

Plaintiff bargained with a drowning man to save his life for a vast sum of money. Would such an agreement be a valid contract?

§ 32. (4) *Undue influence*.—Agreements resulting from the unconscientious use of power arising out of a confidential relation, as guardian over his ward, attorney over his client, or from mental weakness or infirmity, for the purpose of obtaining some advantage, are voidable by the injured party. The law looks with suspicion upon transactions of this nature. This is also true between parent and child, if one of them is in a dependent condition.

The most common illustration of undue influence is the inducing of some aged or feeble person to sign documents which are favorable to the one exerting the influence, and which the former would not approve if he were possessed of his full powers.

If a ward should convey to his guardian, immediately upon becoming of age, valuable property for a very inadequate consideration and should soon afterwards repent of his bargain, the responsibility would rest upon the guardian to show that the ward had been fully advised as to his rights.

QUESTIONS

How does a mistake differ from fraud? What is the effect of a mutual mistake? Does a mistake of law make a contract void or voidable?

Consult a reference book for the meaning of (1) mistake; (2) fraud; (3) duress; (4) error; (5) misapprehension; (6) deception; (7) undue influence; (8) malice; (9) disability; and (10) misrepresentation.

When or under what circumstances will a mistake relieve you from your contract?

What does the word cheat mean? How does it differ from fraud? What are the elements constituting fraud? Is a mere statement of an opinion a fraudulent representation?

Can there be a fraud practiced where no words are spoken? Can one be defrauded if he does not rely on the other's statements?

What are the rights of a person injured by a fraud? Give an example of a misrepresentation of a fact. How does an innocent misrepresentation differ from a fraud?

What is the advantage of requiring one who makes a representation to put it in the form of a warranty?

What are the essential features of duress? Can there be duress where there is no personal violence?

What effect does duress have on a contract?

Explain fully what is meant by undue influence. What are the most common examples? Mention any number of others.

What particular relationship between the parties is necessary in order to raise a presumption of undue influence?

CASE PROBLEMS

Case problem No. 27.—Defendant agreed to buy from plaintiff a cargo of cotton, "to arrive on the vessel Peerless from Bombay." There were two such vessels sailing from Bombay, one in October and the other in December. The plaintiff had in mind the latter vessel and the defendant the former. Is the defendant bound to accept the cotton? If there had been but one "Peerless" and the defendant had said Peerless by mistake, meaning "Peri", what would be your decision? (*Indiana Fuel Supply Co. v. Indianapolis Basket Co.*, 84 N. E. Reporter (Ind.) 776.)

Case problem No. 28.—King bought a promissory note from Black upon Black's assurance that Jones, the maker of the note, was wealthy. It later developed that Jones was insolvent, and Black knew this when he sold the note. Is Black guilty of fraud?

Case problem No. 29.—Macbeth agreed to buy and Antonio to sell "these barrels of mackerel," and the barrels in question turn out to be salt. Is this a contract?

Case problem No. 30.—During the negotiation for the sale of a salt well, the seller falsely represented to the buyer that it was free from gypsum and the brine 90 degrees strength, while in truth there was gypsum in the well and the brine was deficient in strength. Was this fraud or a false representation?

Case problem No. 31.—Plaintiff bargained with a drowning man to save his life for \$1,000.00. Is this a valid contract? Why?

Case problem No. 32.—Plaintiff was induced to enter into an agreement with the defendant to defraud others in a fake foot race, but the plaintiff became the victim, and lost a large sum of money to the defendant, who made a practice of defrauding others by such schemes. Will the courts help the plaintiff recover his money? What particular maxim of law applies to this case?

Case problem No. 33.—Martin, while insolvent, fraudulently obtained goods from Rowley. Martin had no intention of paying for the goods. He sold the goods to Biglow, who was innocent of how they were originally obtained. Rowley brought a suit to set aside the sale and recover his property. Result? (12 Mass. 306.)

CHAPTER VII.

SUBJECT-MATTER OR LEGALITY OF OBJECT.

§ 33. **Definition.**—The subject-matter of a contract, as here used, is the thing to be done, or that which is to be omitted. It is an indispensable element of every contract. Anything in its nature possible and not forbidden or prohibited by law may be the subject-matter of a promise; illegality is never presumed. It is always assumed that a contract is legal until the contrary is shown. But if the thing is illegal, an agreement can not make it legal. If part of it is illegal none of it is legal.

§ 34. **Illegality.**—A contract is void if the subject-matter is illegal, immoral, or against public policy; otherwise it is deemed valid. The subject-matter may be declared illegal either by statute or by the common law. It is impossible and unnecessary to consider all the contracts forbidden by statute in the various states. Those of general interest may be classified as follows:

First. Gambling contracts.

Second. Sunday contracts.

Third. Usurious contracts.

(1) *Wagering or gambling contracts* under the common law were valid, but the statutes of practically all the states have declared them illegal and void. A wager is a promise to give money or money's worth upon the ascertainment of some uncertain event. To constitute a wager, there must be mutual chances of gain and loss and the uncertain event must be the sole condition of the agreement. Hence, bets on horse races, elections, games of chance, and the like, are not enforceable.

An agreement for the purchase or sale of stocks or commodities where neither party intends to deliver or accept them, but simply pay the difference in price according to the state of the market at a certain date, is gambling, and such contracts are not enforceable.

An agreement, however, for the sale of stocks or commodities to be delivered at a future time, although the seller at the time of the sale neither has them in his possession nor owns them, and must go into the market to purchase from a third party, is regarded as a legitimate transaction and is not considered a gambling contract.

Buying and selling on margin is not unlawful, provided actual transactions are intended.

Money deposited with a stakeholder can be recovered at any time before it is paid to the winner, even though the bet has been already decided. Bets once paid cannot be recovered, nor can the winner of the bet go into court and compel the payment of the money to him.

(2) *Sunday agreements*.—Contracts made on Sunday are void, or are at least unenforceable in many of the states; like gambling contracts, they were valid under the common law, but are not so considered under statute law, which forbids work, labor, or business on Sunday, unless they relate to works of mercy, charity, or necessity. Contracts made on Sunday are not void if they are ratified on a secular day. They will also be good if delivered on a week day and to take effect from delivery and not from the execution of the contract. The dating of a contract on a secular day does not change its validity if it was executed and delivered on Sunday. Nor is an agreement void if it is entered into on a week day but is dated, or to be performed, on Sunday.

Rebecca Cook discounted on Sunday, a note made by one Weston. For the proceeds of the note she gave a check, but dated it the next day. Weston indorsed the check on Sunday but did not present it to the bank for payment until three days later. The presentation and payment of the check on a legal day ratified the transaction and made a legal loan of the money. (44 Atl. Rep. 560.)

(3) *Usury*.—Contracting for the use of money at a greater rate than allowed by law is termed usury. A lower rate than that fixed by law may be legally agreed upon. If the parties fail to stipulate for any permissible rate the legal rate will be the one that governs. In some states a legal rate has been fixed and the maximum rate is left open. And also, in some states laws have been passed permitting loan associations, pawnbrokers, etc. to charge a higher legal rate than that of other business enterprises. The penalty differs in various states, but that most commonly exacted on usurious contracts is a forfeiture of all interest. A loan of money with an agreement to accept a portions of the profits is not usurious.

National banks are allowed to charge whatever rate is permitted by the law of the state in which they are located. If a usurious rate has been collected, the party paying the same may recover twice the amount of interest paid.

A loan for which the borrower paid the maximum interest, and in addition paid the mortgage registry tax upon the mortgage given to secure the same, is held not to be usury. (125 Minn. 218.)

Penalties for usury.—California, Colorado, Maine, Massachusetts, Montana, double interest; Nevada, fine or imprisonment. Loss of principal and interest is the penalty in Arkansas and New York. Loss of principal in Delaware and Oregon.

Loss of interest in Alabama, Alaska, District of Columbia, Florida, Idaho, Illinois, Iowa, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, North Carolina (double amount if paid), North Dakota (double amount if paid), Oklahoma, South Carolina, South Dakota, Texas, Virginia, Washington (double amount if paid), Wisconsin and Wyoming.

Loss of excess of interest in Connecticut, Georgia, Indiana, Kentucky, Maryland, Missouri, New Hampshire (three times), New Mexico, Ohio, Pennsylvania, Tennessee, Vermont, and West Virginia. Loss of double the excess interest, Kansas. Loss of principal and interest in Rhode Island, also fine or imprisonment.

INTEREST TABLE.

§ 35. The following table shows the legal rate of interest and the limit allowed by special contract in each state and territory:

States and Territories	Legal rate Per ct.	Limit Allowed by Law Per ct.	States and Territories	Legal rate Per ct.	Limit Allowed by Law Per ct.
Alabama	8	8	Montana	8	12
Alaska	8	12	Nebraska	7	10
Arkansas	6	10	Nevada	7	Any rate
Arizona	6	10	N. Hampshire.....	6	6
California	7	Any rate	New Jersey.....	6	6
Colorado	8	Any rate	New Mexico.....	6	12
Connecticut	6	12	New York.....	6	6
Delaware	6	6	North Carolina.....	6	6
D. of Columbia.....	6	10	North Dakota.....	7	12
Florida	8	10	Ohio	6	8
Georgia	7	8	Oklahoma	6	10
Idaho	7	12	Oregon	6	10
Illinois	5	7	Pennsylvania	6	6
Indiana	6	8	Rhode Island.....	6	Any rate
Iowa	6	8	South Carolina.....	7	8
Kansas	6	10	South Dakota.....	7	12
Kentucky	6	6	Tennessee	6	6
Louisiana	5	8	Texas	6	10
Maine	6	Any rate	Utah	8	12
Maryland	6	6	Vermont	6	6
Massachusetts	6	Any rate	Virginia	6	6
Michigan	5	7	Washington	6	12
Minnesota	6	10	West Virginia.....	6	6
Mississippi	6	8	Wisconsin	6	10
Missouri	6	8	Wyoming	8	12

§ 36. **Public policy.**—Contracts, the subject-matter of which is contrary to good morals or is opposed to the public will and welfare of the state or community, are illegal as being contrary to public policy. The leading classes of agreements of this character, void either by statutes or under the principles of the common law, are, namely:

First. Contracts in restraint of trade.

Second. Contracts in restraint of marriage.

Third. Contracts obstructing public justice.

Fourth. Contracts tending to injure public service.

(1) *Restraint of trade.*—It is a well-settled principle of law that contracts in unreasonable restraint of trade are illegal; it is against the interest of society that a man should deprive himself of the right to exercise his skill in earning a living. The public is entitled to the advantage to be derived from man's activity in his chosen calling. Hence, agreements not to engage in a particular business anywhere at any time would be unreasonable and unenforceable.

Frequently, the goodwill is the most important and valuable part of a business asset. It is right and proper that one who

buys the goodwill of another should be protected in the enjoyment of that right by preventing the seller from reentering into competition before the purchaser has established a reputation with the new trade. Restraint of trade embraced by agreement under limitation as to time, persons, and locality are not necessarily restraint of trade in the sense which renders the contract void. Therefore, agreements not to engage in a particular line of business within a reasonable distance and a reasonable period will be binding.

What may be a reasonable limitation in one case may be unreasonable in another. A contract by a lumber dealer in a small town, whose trade was confined to a small area, not to engage in business anywhere in the state would be void; whereas a contract by a wholesale dealer, operating throughout several states, not to compete with the purchases in that territory would be upheld.

Sales of existing business concerns to competitors who have for their object the lessening of competition, the stifling of trade, and the creating of a monopoly, are illegal because they are in restraint of trade.

(2) *Restraint of marriage*.—Agreements which have for their object the restraint or freedom of marriage are illegal as being against public policy. Contracts not to marry at all, or not to marry any person inhabiting the same town, county, or state, or of a particular trade or profession, are void.

Contracts in limited restraint may be enforceable, as a promise to marry or not to marry a particular person; or during minority, not to marry without the consent of parents or guardian.

While the law favors marriage, it is opposed to match-making in consideration of compensation. Hence, promises to pay a third person for negotiating a marriage between two parties is void, and money paid for such service may be recovered.

(3) *Obstructing justice*.—Agreements, the object of which is to bind one to abstain from testifying as a witness in a suit, to pay a witness more if the party succeeds than if he does not, or not to prosecute a thief if he returns the stolen property, are void.

Agreements encouraging litigation are likewise void. A contract between an attorney and client providing that the attorney is to prosecute a suit for the recovery of property or damages in consideration of receiving a portion thereof as compensation for his services is enforceable. But if the contract provides that the attorney is to defray the expenses and pay the costs it is not enforceable.

(4) *Injuring public service*.—A promise to pay money, to furnish employment, or to render directly or indirectly any service for the purpose of unlawfully procuring legislation or corrupting voters is absolutely void. This, however, does not affect the right of petition guaranteed by the constitution, nor is it to be understood that an attorney or other suitable person may not appear before a legislative or judicial body and present facts and arguments for the attainment of the object sought, and a promise to pay the person so acting will be binding.

One who circulates a petition for the appointment to office of a particular individual, or for the purpose of securing the pardon of a person convicted of crime, may recover pay for such services if there is an agreement to that effect. But a promise of pay to one to influence him in the signing of such a petition would be a violation of law.

A contract between two persons that they are to refrain from bidding against each other at a judicial sale, and that one should bid in the property, each paying one-half the purchase money, is against public policy and will not be enforced. (13 M. A. 361.)

QUESTIONS

What is meant by the subject-matter of a contract? What may be considered as subject-matter? Mention several objects that are lawful. Several that are unlawful.

When is a contract considered illegal?

Upon what ground may a contract be declared illegal?

Consult a dictionary for the meaning of (1) wager; (2) gambling; (3) margins; (4) bucket shop; (5) futures; (6) restraint; (7) monopoly; (8) lobbyist; (9) collusion.

What is a wager? In what respect have the statutes changed the laws concerning gambling?

Is the sale of goods, to be purchased by the seller in the future, valid? Under what conditions is it lawful to buy and sell on margins? If the parties actually contemplated a sale at the time of making the agreement would it be illegal for them to agree at the time of delivery to settle by the payment of money?

What was the common law in regard to Sunday contracts? What is the modern law? What is the law on this subject in your state? What contracts, if any, made or to be performed on Sunday are still valid in all the states? What is the meaning of a *secular* day? What is the effect of dating a contract on Sunday? If a note is so dated that it becomes due and payable on Sunday can it be collected? Can a contract made on Sunday be ratified later so as to be valid?

What are the statutes of your state concerning work and labor? Is the making of a contract work and labor?

Define usury. What is the usual penalty for usury? What is the penalty under the laws of your state? When one loans his own money, can he charge a commission so as to make the total amount paid for interest more than the legal rate? What is the meaning of legal rate and contract rate? What law determines the rate of interest that may be charged by National banks?

What is the meaning of public policy? What contracts are considered void on the ground of public policy?

What is the theory of the law forbidding contracts in restraint of trade?

What is a monopoly? Is a combination for the purpose of forming a monopoly illegal? Why? If the maker of a popular automobile by reason of his efficiency succeeds in securing practically the entire market for his car is this a monopoly?

What are the conditions under which there may be a limited restraint of marriage?

Explain the meaning of obstruction of justice. What is the effect of contracts which have for their purpose the obstruction of justice?

When is a contract to influence legislation (a) legal; (b) when is it illegal? What is a lobbyist? Is lobbying legal or illegal?

CASE PROBLEMS

Case problem No. 34.—Plaintiff and defendant made a bet as to the place of burial in a certain cemetery, of a lawyer who had died years previously. The money was placed in the hands of a stakeholder, and all the parties repaired to the cemetery, where each party in the wager, contending he had won, demanded

the entire sum deposited with the stakeholder. The latter paid the money to the defendant over the protest of the plaintiff. Plaintiff brought proceedings to recover his money from the defendant. Will the loser be entitled to recover his deposit from the winner? If the money were still in the hands of the stakeholder, what would your answer be? Give reasons for your answer. (Love v. Harvey, 114 Mass. 80.)

Case problem No. 35.—Adams agreed to buy a horse of Brown on Sunday. On Monday Brown delivered and Adams accepted the horse. Has Adams ratified his contract by accepting the horse? Can Brown recover on any other grounds?

Case problem No. 36.—For many years the defendant had been engaged in the bakery business. On the first of May he sold his entire business to the plaintiff and agreed that for a period of ten years, under a penalty of \$5,000.00, he would not engage in the same business within a radius of five miles from his former location. On the first of July in the same year the defendant resumed the bakery business within a few blocks of his former location. Was the agreement of the defendant binding? Can the plaintiff recover any part of the \$5,000.00 as damages, and if so how much? If the defendant had agreed not to engage in this particular business anywhere in the state, how would this affect your answer? How, if he had gone into business in a neighboring city in the same state? (Franz v. Bieler, 56 Pacific 249.)

Case problem No. 37.—News Item: "Women Break Promise.—A broken promise yesterday cost J—— M—— \$21.00. J—— M—— is a public chauffeur, and was summoned by two women to drive them to a fire on the South side. 'Drive fast. If you get "pinched" for speeding, we will pay the fine,' they told the chauffeur. He was arrested, and when fined \$25.00 and costs, the women said they would pay only \$10.00 of the amount." Can the chauffeur collect the remainder from the women? Give reasons for your answer.

Case problem No. 38.—Black was a candidate for office. He promised Green that if the latter would vote for him, he, Black, would see that Green was appointed clerk in the recorder's office. Green voted for Black, but Black secured the appointment of Brown to the clerkship. What are the rights of the different parties to the controversy?

Case problem No. 39.—The merchants and business men in a certain city organized a Commercial Club. One of the purposes of the organization was to procure the passage of laws which the members believed would be beneficial to their community. To this end they employed an attorney to draft bills for introduction into the legislature; and to appear before committees to present arguments for the adoption of the proposed measures. After the attorney had performed his part of the contract, the club refused to pay his fee. He brought suit against the Commercial Club for his salary. Is he entitled to recover and why?

mutual - meeting of minds

What are the elements of a contract?

1. sufficient consideration

2. must be a benefit to promisee and a loss to promisor

CHAPTER VIII.

CONSIDERATION.

§ 37. **Need of a consideration.**—It is an ancient and well established rule of law that a consideration is an essential element of a simple or parol contract, and it makes no difference whether the agreement is in writing or by word of mouth. The consideration is the reason which moves the parties to enter into a contract. An agreement to do or pay something without compensation of some sort in return—a promise to give something for nothing—is void although the promise may be admitted.

If Richard Roe should promise to give John Doe a new suit of clothes as a gift, and afterwards refuse, the law would not compel Roe to make good his promise, there being no consideration. However, if Doe agreed to work for Roe, regardless of the length of time, and the latter promises Doe a suit of clothes in payment, it would be an enforceable agreement, there being a consideration for the promise.

Consideration is what distinguishes a contract from a gift. The promise of a gift can not be enforced; if made, its return can not be demanded.

§ 38. **Definition.**—Consideration may be defined as something that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. Any damage, detriment, suspension, or forbearance of a right suffered by the one party to the advantage, profit, or interest of the other will be regarded as a consideration.

The consideration need not necessarily consist of money or property. It may be work, it may be a promise to do or not to do some particular act, or it may be any one of an unlimited number of things.

Brown sold Smith a hat for five dollars. The consideration was the money paid for the hat.

The makers of a remedy for influenza offered in an advertisement to give a large sum of money to anyone who would use their remedy for a specified period and contract this disease. A lady who so used the remedy and caught influenza was held to have furnished the consideration for the promise. (L. R. 1 Q. B. 256.)

§ 39. **Detriment.**—The word *detriment* means the doing, by the one making the promise, of something that he was not legally obliged to do. Obviously, then, it is not a detriment for one to forbear doing that which he is under duty bound to perform, and an agreement of that sort would fail for lack of a consideration.

An uncle promised his nephew \$5,000.00 if he would refrain from drinking liquor, using tobacco or profane language, or playing cards until his twenty-first birthday. The young man agreed to do so and complied with his promise,

but the uncle claimed the agreement was not founded on a valid consideration. The court held that there was a sufficient consideration for the promise in refraining from doing those things which might be ethically wrong but legally right, and awarded the nephew the money. (124 N. Y. 538.)

Brown, a merchant promises to pay Smith, a clerk, \$100.00 at the end of the year if the latter is honest; Jones offers Black, a fireman, \$50.00 if he will save the former's building from loss by fire. Neither Smith nor Black can recover the amount promised. Where one is already required to perform some act or duty his promise is not a legal consideration.

§ 40. **Adequacy.**—It is not essential that the consideration be adequate in point of actual value. If it has a legal value, it makes no difference how small that value may be; neither will the courts inquire into the adequacy, unless there is evidence of bad faith or fraud. Nor will they assist in the making of bargains or to avoid the consequence of a "bad bargain." If one agrees to "pay too much for his whistle" he will have to make the best of it without the help of the law. Hence, the delivery of the most trivial article, or the doing of some insignificant act at the request of another is sufficient consideration for paying large sums of money. But a consideration grossly inadequate would be tainted with suspicion.

In a somewhat celebrated case it was decided that a promise to pay \$600.00 in consideration of one cent was void because the consideration must be something more than a mere pretense—it must be reasonable. The inadequacy of the consideration must not be so gross as of itself to prove fraud or imposition. (17 Ind. 29.)

§ 41. **Mutual promises.**—A consideration based upon mutual promises is valid. The promise of the one party is the consideration for the promise of the other. Mutual promise to marry is a common illustration.

This principle is also applied to the signing of a subscription paper in which a number of persons unite in agreeing to pay the amount set opposite their names for the purpose indicated in the paper. The promise of each to pay the amount subscribed is a consideration for the promise of the others, as where a number of persons subscribe for the purchase of stock for the purpose of organizing a bank or other business undertaking.

If the subscription is for a charitable, religious, educational, or public enterprise, the consideration is supplied when the organization incurs liabilities in furtherance of the object the donors intended to promote. Or if the terms of the subscription are that a definite sum is to be raised, the completion of that amount will constitute a consideration.

Form of a Subscription Blank for a Building Fund.

HELPING HAND AND Y. M. C. A. BUILDING FUND.

For the purpose of providing an up-to-date building for the Helping Hand Institute, to cost \$100,000; a modern building for the Young Men's Christian Association, to cost \$100,000; and to furnish and equip the Street Boys' Annex, to the present Young Men's Christian Association Building at a cost of \$25,000; and in consideration of the subscriptions of others—I hereby agree to pay to the Treasurer of said fund the sum of DOLLARS, upon

condition that \$225,000, or more, be subscribed for the above-named purposes by February 7, 1915.

When the above condition is met one-fifth of this subscription is payable April 1, 1915, and one-fifth each in four, eight, twelve and sixteen months thereafter.

Signed.....
Address (St. and No.).....

§ 42. **Part payment.**—The payment or the promise to pay less than the amount due on an undisputed indebtedness is no consideration for the release or extension of the remainder of the debt. This is subject to certain qualifications, as follows:

(1) Payment of a part before the debt is due or at some other place than originally agreed upon will be an adequate consideration.

(2) If the amount of the debt is in dispute, the payment or promise to pay a less sum will be a sufficient consideration.¹

(3) The giving or promising to give something other than money, regardless of its pecuniary value, will be a consideration for the satisfaction or extension of the debt.

Smith tells Brown that if Brown will pay \$500.00 he need not pay the remainder of a debt, amounting to \$600.00, which is not in dispute. Brown pays the \$500.00, but Smith may recover the other \$100.00 for lack of consideration, since Brown was doing only that which he was legally obliged to do.

If Smith had made it a condition that Brown was to pay the money in Jonesville when the debt was due in Harlem, or that he was to pay it one day before it was due, or that he would accept \$500.00 in cash, and a necktie for the other \$100.00, there would have been a consideration, and Smith would have been fully discharged from his indebtedness.

§ 43. **Insufficient consideration.**—There are certain apparent considerations that have been declared insufficient to enforce a binding contract. They may be classified as follows:

First. Moral consideration;

Second. Past consideration;

Third. Impossible consideration;

Fourth. Illegal consideration.

(1) *Moral obligation.*—A moral duty is not a sufficient consideration to uphold a promise. It may be regretted that such is the law, but it is. It is the moral duty of a son to support his parents if they are in want, but a promise of that character is of no more legal worth than if made by a stranger. Time can never remove the moral obligation to pay a lawful debt, although certain statutes or a discharge in bankruptcy may remove the legal obligation to do so.

(2) *Past performance.*—A promise to pay for some gratuitous service already performed—as gratitude for past favors—is not enforceable. The one who did the act suffers no detriment on

¹(The common-law rule that the payment of a lesser sum than is due does not support a promise to release the entire debt has been changed by statute in Alabama, Georgia, Maine, North Carolina, Tennessee, and Virginia.)

the strength of the promise. A debt of gratitude can not be transferred into a debt at law.

If one voluntarily saves the life of another from an attack by robbers, or his property from loss by flood, or pays his friend's debts, or does any other kindly act, without a previous request, the subsequent promise of the recipient can not be enforced; it is an insufficient consideration. "Perhaps it is better for the public," according to a learned justice, "that these voluntary acts of benevolence from one man to another, which are charities and moral duties but not legal duties, should depend altogether for their reward upon the moral duty of gratitude."

(3) *Impossibility*.—An agreement based upon a consideration which is physically impossible is not binding. To be physically impossible it must not be within the limits of human possibility. A lack of funds or foresight, or that it is merely difficult, is not a legal excuse for a failure to act. If the act was once possible and afterwards becomes impossible, the party failing to perform would have to make the contract good by paying damages.

An agreement to discover perpetual motion or to sail away to the moon is void.

Smith agreed to work one year for Brown. At the end of one month Smith became disabled on account of sickness and was unable to work for a year. Smith was entitled to the month's salary earned.

Defendant entered into a contract to deliver to the plaintiff a quantity of beans, but an early frost killed the defendant's crop; he was held liable on his agreement, because he could purchase beans with which to fill the order.

King rented a music hall from Brown for a series of concerts. The building was destroyed by fire without the fault of either party, before the concert was given. The destruction of the building relieved both parties from liability.

(4) *Illegal consideration*.—A consideration for a promise to do an act contrary to law is void. The law will not enforce contracts against itself; an agreement to commit a crime being illegal, either party may avoid the contract. Promises contrary to good morals or binding one to abstain from some unlawful conduct are therefore classified as insufficient considerations.

QUESTIONS

Define consideration. What is the meaning of (1) detriment; (2) suspension; (3) forbearance; (4) advantage; (5) benefit; (6) adequacy?

Give several illustrations of a contract in which the consideration consists of (a) a promise for a promise; (b) a promise for an act; (c) and an act for a promise. Is it necessary that the consideration be something of equal value exchanged by the parties to a contract?

In what respect does a gift differ from a contract? Can the promise to make a gift be enforced? Why? If a gift is once made can it be recalled? (What is an Indian gift?) What do you understand to be the meaning of the expression "a gift with a string tied to it?"

Is the payment of a nominal amount, such as one dollar, a sufficient consideration to support a contract? May one sell his property for any price he chooses, regardless of its market value? What is the meaning of adequacy of consideration?

What is the theory of consideration as applied to signing subscription papers? Draw up a subscription paper for contributions to build a public drinking fountain.

Is the payment of a less sum than the actual amount due a consideration for the release or extension of the remainder of the debt? Such a payment is sub-

ject to what qualifications? Has this common law rule been changed by statute or by court decisions in your state? (Ascertain the meaning of a liquidated debt.)

What apparent consideration is regarded insufficient to enforce an otherwise binding contract? What is a moral consideration?

Why is an agreement to do some act contrary to law illegal? Are such contracts void or voidable?

What is the rule in regard to an agreement to perform an act that is impossible? If the contemplated act were possible at one time what would be the effect of a present impossibility? Does the illness of a concert singer excuse a nonperformance?

CASE PROBLEMS

Case problem No. 40.—Plaintiff was under a contract of employment to work for defendant for \$60.00 a month for a year. After working for defendant two months the plaintiff received an offer from a third party at \$75.00 a month. Defendant agreed that if plaintiff would stay and perform his work according to the original agreement, that he would pay the latter \$150.00 as a bonus at the end of the year. Plaintiff brought suit at the end of the year for the additional \$150.00 promised him. Is the defendant's promise enforceable? Why? (117 Ga. 504.)

Case problem No. 41.—An architect contracted to prepare plans and superintend the erection of a large building. Upon learning that a certain part of the building contract he had himself hoped to secure had been given to another he became very angry, took his plans home, called off his superintendent, and quit. The owner of the building then promised to pay him a commission of 5% additional as an inducement for him to resume work upon the job he had previously contracted to do. Can he recover for any part of the work, and, if so, how much? Give reasons for answer. (103 Mo. 578.)

Case problem No. 42.—Regal, a rich banker, promised his nephew that if the nephew would name his son after the banker that the latter would pay him \$5,000. The nephew accepted the offer and named his son as proposed. Will the banker have to pay the amount promised? What is the consideration? (124 N. Y. Appellate 538.)

Case problem No. 43.—Defendant owed plaintiff a sum of money which was admitted by the former to be \$100.00. Plaintiff agreed to accept \$80.00 in payment of the debt, and this amount was paid to him. He thereafter brought suit to recover the remaining \$20.00. Is he entitled to recover it? (108 Mich. 52.)

Case problem No. 44.—The following inquiry was received by a teacher of commercial law: "Sometime ago we supplied six ice boxes to a customer at an agreed price. There was no question about the amount to be paid, and so far as we know the ice boxes were satisfactory in every respect. Now, we have received a letter from the customer stating that he can not pay the bill in full, but is enclosing a check for sixty percent of the amount. Can we accept this check and sue him for the balance?"

Case problem No. 45.—A mother paid for her son's education, with no agreement that he was to repay the money. Years afterward the son voluntarily gave his mother a note in consideration of the money she had advanced to him. Can the mother collect payment on the note when due? (70 W. Va. 38.)

Case problem No. 46.—A—— made a contract with B—— to take 1,000 tons of potter's clay every year, but at the time of making the agreement there was less than 200 tons of such clay under B——'s land. What is B——'s liability?

Case problem No. 47.—If A creates a debt to B on some illegal consideration, such as gambling, and afterwards A should promise to pay the money, can B enforce the promise?

Case problem No. 48.—Antonio, having a grievance against Shylock, made arrangements with Graft, the publisher of a newspaper, to pay him \$100.00 if he would print and publish libelous stories concerning Shylock's character. Graft published the stories. Can he collect the \$100.00 from Antonio?

CHAPTER IX.

STATUTE OF FRAUDS.

§ 44. **Its object.**—While the law does not prescribe the form of simple contracts, certain agreements to be enforceable at law must be attested by a note or memorandum in writing, and signed by the party or his agent sought to be held liable. This was not always so. There was a time when contracts, regardless of their nature, whether in writing or not, could be enforced. But in order to prevent fraud and perjury in the proving of contracts before the courts, the English parliament in 1676 passed the statute of frauds and perjuries, now familiarly known as the "Statute of Frauds."

It is the design of the law to protect men, in their business dealings with each other, by reducing the opportunities of those who are inclined to be dishonest or unscrupulous. On the other hand, we are liable to defects of memory; within a short time after the occurrence of a business transaction, misunderstandings and differences of opinion are apt to arise; witnesses die, causing contracts of certain kinds to be more or less difficult to prove.

It may seem strange that in early times the parties to a contract could not personally be witnesses to its proof. This was thought to aid in the securing of perjured witnesses when proof was necessary. Dishonest persons were induced for a money consideration to swear falsely as witnesses. In this connection, it might be remarked that no law is so effective as to be incapable of abuse in unscrupulous hands.

§ 45. **Statute of Frauds.**—The two sections of that statute which have to do particularly with contracts are contained in the fourth and seventeenth sections. Both of these sections have been adopted with slight variations and modifications by most of the American states.

Fourth section.—Under this section it is provided that no action shall be brought:

First. To charge any executor or administrator upon any special promise to answer for any debt or damages out of his own estate; or,

Second. To charge any person upon any special promise to answer for the debt, default, or miscarriage of another person; or,

Third. To charge any person upon any agreement made in consideration of marriage; or,

Fourth. Upon any contract made for the sale of lands, tenements, hereditaments, or any interest in or concerning them; or,

Fifth. Upon any agreement that is not to be performed within the space of one year from the making thereof; unless,

(a) The agreement upon which such action shall be brought, or (b) some memorandum or note thereof, shall be in writing, and (c) signed by the party to be charged therewith, or (d) some other person thereunto by him lawfully authorized.

(1) *Executors and administrators.*—This clause relates to the promise of an executor or administrator to pay a claim against the estate he is administering out of his own estate. It is the duty of these persons to settle the estates of deceased persons. They are not personally liable for any of the debts of the estate. Should they, however, undertake to pay a claim made against the estate out of their own estate, such a promise, to be binding, would have to be in writing and be signed by them.

(2) *Promise to pay the debt of another.*—A person is always liable on his promise to pay his own debts; but he is not liable for a promise to pay the debt or default of another unless such an agreement is in writing. (This topic will be discussed more fully in another chapter under Guaranty and Surety; see § 125.)

If two men enter a store, and the one buys, and the other in order to secure credit says to the seller, "Let him have the goods. If he does not pay you I will," this is a promise to pay the debt of another, and must be in writing. But if he says, "Let him have the goods, but charge them to me," this is an original agreement. The first party is regarded as the actual buyer, and it is binding even though not in writing.

(3) *Agreement in consideration of marriage.*—There is a distinction between promises to marry and promises in consideration of marriage. This clause relates to agreements to pay money or settle property on another in expectation of marriage, where the marriage is the consideration for such a promise.

It frequently happens that when a man is possessed of considerable property, before the woman will marry him, he agrees to settle a part of this property upon her for her protection and support. Such agreements must be in writing.

(4) *Contracts involving real estate.*—In ancient times, real property was conveyed by having the grantor and the grantee enter upon the land, and in the presence of witnesses, having the former hand the grantee a twig or clod of earth as a symbol of the delivery of the land and title thus passed. The statute changed this by requiring that an agreement whereby one party agrees to sell land to another must be in writing, the same as the deed. Not only land, but any interest therein was included.

(5) *Performance within a year.*—This clause relates to contracts that are not to be performed within one year from the making thereof. The test is not whether it can be actually completed within the year, but whether, within the contemplation of the parties, the contract is capable of performance within the year. If the agreement is absolutely impossible of performance within a year, or provides by its terms for a longer period, it comes within the requirements and must be in writing. If it

may or may not be performed within a year, it need not be in writing. The test is whether it may be performed within the year.

An agreement to support another for life, or an indefinite period, or do any other thing possible to be done within a year, although the doing may continue and be expected to continue longer, need not be in writing. But an agreement to support a child three years old until he attains his majority would have to be in writing.

An instalment contract where the monthly payments extend over a longer time than a year would come within the statute. If an order for 1,000 lamps from a factory at a specified price per lamp has been made without a fixed time for delivery, after one hundred lamps have been received and paid for, the remainder of the order would not fall within the requirements, since it might be performed within one year.

§ 46. **Note or memorandum.**—Contracts in which this statute is involved must have competent parties, agreement—offer and acceptance—subject-matter, and consideration; if one of these essentials be absent there is no contract. The writing or memorandum must state the contract with reasonable certainty, so that terms, price, and all necessary data can be ascertained. In other words, it must contain the whole agreement.

The memorandum may be a note in pencil, a printed form filled in, or a single formal instrument. It may even be a series of letters or telegrams, provided they are construed together to establish a contract.

Signing of memorandum.—Only the party sought to be held need sign the contract, or someone by him duly authorized. Both parties need not sign it. Prudent business men will insist that each party sign agreements coming within the provisions of this statute. Too much care can not be exercised in giving attention to business details, although they may not be legally necessary.

Gault, the plaintiff, owned a house and two lots in Wyandotte, Michigan, which he contracted to sell to Stormont, the defendant. The defendant paid Gault \$75.00 down, and plaintiff gave him a receipt as follows:

“Wyandotte, April 26, 1881.

Received from George Stormont the sum of seventy-five dollars as part of the principal of ten hundred and fifty dollars on sale of my house and two lots on corner of Superior and Second streets in this city.

David Gault.”

Gault was unable to give a deed to the property because his wife would not join therein, and Gault then brought suit against Stormont for possession of the property which he had allowed Stormont to enter.

The court held that there was no written evidence of the sale of the lots except the receipt which was given for the seventy-five dollars, and that was insufficient to answer the Statute of Frauds since the memorandum must be complete in itself and leave nothing to rest in parol. (51 Mich. 636.)

Seventeenth section.—This section pertains to the sale of personal property and will be considered in detail in the chapters devoted to that subject. (See § 142.)

QUESTIONS

What is the object of the Statute of Frauds? When and where did it originate? How extensively has it been adopted? What is an oral contract? Are oral contracts ever valid? Under the Statute of Frauds what contracts **must** be in writing? Make a copy of the provisions of the Statute of Frauds of your state.

What is an executor? Administrator? When do they become personally liable for the debts of the estate they are administering?

You give the Mutual Telephone Company your oral consent to string their wires across your property in consideration of a stipulated sum of money. What will be your legal liability if afterwards you refuse permission? What would be your answer if the telephone company had signed a written memorandum to pay you a certain sum for the foregoing privilege?

If only one of the parties to a contract signs the note, memorandum, or agreement, can he be required to fulfill his obligation? Can the other party, who did not sign, be held? Must both parties to a contract under the Statute of Frauds sign it?

When the note or memorandum is properly signed and is afterwards lost or destroyed, will the transaction be void? May the previous existence of the written instrument be proved by oral testimony?

To be a memorandum binding in every respect, what particulars must it show?

Enumerate the essentials that must be embodied in the written note or memorandum to comply with the requirements of the Statute of Frauds.

CASE PROBLEMS

Case problem No. 49.—Ben Johnson wishing to buy a suit of clothes, Boswell, his friend, said to the merchant: "Let Johnson have the clothes, and if he does not pay you I will." Must such a promise be in writing to hold Boswell liable? If Boswell had said, "Let Johnson have the suit of clothes, and I will pay you next week." What would your answer be? In what respect does the first proposition differ from the second?

Case problem No. 50.—June 1, 1916, John Doe and Hannah Roe entered into a mutual promise to marry on the first day of June, 1918. Must this contract be reduced to writing? Under what circumstance must a promise to marry be in writing?

Case problem No. 51.—Blight, a fruit grower in Red Valley, Oregon, made an oral agreement to deliver to Young & Co., in St. Louis, his entire apple crop for two successive seasons. The crop was delivered the first season according to agreement, but the second season, Blight, for reasons best known to himself, refused to deliver any of his crop. Can Young & Co. recover damages for breach of agreement? Explain your reasons.

Case problem No. 52.—Allen orally agreed to sell a certain farm to his brother Bill for \$5,000. Bill paid part of the purchase price at the time of making the agreement. Later Allen refused to make a deed and Bill sued him for the property. What in your opinion was the result? (*Brawdy v. Brawdy*, 7 Pa. 157.)

Case problem No. 53.—Andrews sold through an auctioneer a tract of land. The only memorandum or note of the sale was made by the auctioneer. The note complied with the statute of frauds in describing the property sold, the price and terms, and gave the name of the buyer but failed to name the seller or owner. The seller refused to carry out the contract and the buyer brought suit. Is the buyer entitled to recover and on what grounds? (26 N. E. Rep. 758.)

CHAPTER X.

OPERATION OF CONTRACTS.

§ 47. **Third parties.**—The forming of a contract creates legal rights and corresponding obligations. After its formation, no one but the original parties are bound by it, or are entitled to the rights under it. It is reasonable that he who makes a promise should perform; likewise, that the one who gives the consideration should receive the benefit.

To the foregoing rule there are some exceptions. The contract itself may provide that either party may substitute another in his place. The custom and usage of business may also permit this substitution. A contractor agrees to build a house. It is well understood that he will not do all the work himself; that he may sublet parts of it to other contractors. In this latter case, those employed under the original contractor would hold him and not the owner liable.

Third parties may become liable under a contract by inducing another to break his agreement, or by using unlawful means to prevent one from forming a contract. Hence, a person who knowingly persuades or entices another to leave the employ of one in whose service he is employed or who prevents a person from entering the employment of another by threats or intimidation is liable for damages to the one wrongfully injured.

The plaintiff engaged a musical artist to sing at his theater. The defendant induced the musician to break the contract. The defendant was held liable for damages to the plaintiff through the musician's breach of the contract.

§ 48. **Assignments of contracts.**—The transfer of one's property rights is termed an assignment. The person making the assignment is called the assignor; the one to whom made, the assignee. A party may transfer or assign his property rights under a contract, but not his duties or liabilities.

The assignment may be by agreement or by operation of law.

Grover sold his grocery store, goodwill, fixtures, liabilities and accounts outstanding against his customers to one named Gates. This assignment of debts would be enforceable against all valid claims, and Mr. Gates could proceed at law to collect them if such procedure should be necessary. But Mr. Grover would be liable for his debts to his creditors if Gates failed to pay them.

Contracts for personal service can not be assigned. If defendant agreed to write a book for plaintiff, the former could not assign his contract to Doe. The contract called for the personal work of a particular person, and therefore it could not be transferred.

Wilcox agreed to work Kruger's farm on shares. Mrs. Wilcox was to cook and wash for Kruger, and all the parties were to work together. Shortly after entering into the agreement, Mrs. Wilcox took her family and left the farm. The husband then made arrangements for his father and mother to move on

the place, and assigned to them his contract. The old folks were willing to do the work, but the contract being one of personal service was held not assignable. (39 Mich. 94.)

§ 49. **By operation of law.**—When a man dies, his personal property passes by operation of law to his representative, termed an administrator or executor, who settles up the estate. This representative on behalf of the estate acquires the rights of the contracting party who dies.

Faxton contracted to build a house for Moore. While the house was in process of erection Faxton died and Long was appointed his administrator. The latter would be required to complete the building.

§ 50. **Rights acquired by assignee.**—When the rights under a contract are assigned, the assignee gets the rights of the assignor, but no more. The other party to the contract may make any defenses against the assignee that he had against the assignor.

Paxton agreed to build a house for Moore for six thousand dollars, according to certain plans and specifications. During the process of construction agreed changes were made which reduced the cost of the building to five thousand three hundred dollars. Paxton assigned his rights to the contract price after the house was completed to Jones, who would be entitled to collect the latter sum, and not the original contract price. The defense of Moore against Paxton is good against Jones, the assignee.

§ 51. **Notice.**—As soon as an assignment is made, notice should be given to the other party. If the debtor is not informed, he will be justified in believing that he owes the original creditor, and payment to him will satisfy the debt. However, the assignment is valid between the parties as soon as it is made.

§ 52. **Form of an assignment.**—No particular form is necessary. The following will pass all the rights of the assignor:

Houston, Texas, August 11, 1921.

For value received, I hereby assign to Richard Roe all my right, title, and interest in the within (account, contract, or whatever the instrument may be).

Richard Style.

§ 53. **Protection to contracts.**—The Constitution of the United States dignifies the importance of contracts. Among the several powers forbidden to the states by the constitution is the power to pass any law impairing the obligation of contracts.¹ The construction of this provision has been the subject of a vast amount of judicial discussion. The contracts intended by the constitution have reference to all those over which the state can have authority, and includes the contracts of the state itself. This prohibition is aimed at the legislative power of the state, and not at the decisions of its courts.

¹ Const., Art. 1, Sec. 10.

The contracts protected by the Constitution are those to the terms of which individuals have assented as well as the contracts of the state itself. If Stone owes Brown a certain sum of money on which he has agreed to pay eight per cent., a lawful rate of interest, the legislature could not reduce the rate to four per cent. on this contract. However, if Stone owed Brown a debt and upon suit the latter recovered judgment for the amount of the claim, and the law at the time of the judgment allowed eight per cent. interest as damages on judgments so long as they remained unpaid, the state may pass a law reducing the rate of interest on such judgments.

Dartmouth College Case.—In 1769 the King of England granted a charter to Dartmouth College, in New Hampshire, specifying the number of trustees, how they were to be elected, and hold their offices, what powers they should have and what duties they should perform. In 1816 the legislature of New Hampshire passed a statute attempting to amend this charter in many important particulars, making many changes in the organization of the college. The corporation refused to accept the changes and brought suit against those who took possession under the amendments to the charter.

The Supreme Court of the United States held that the charter was a contract, made upon a valuable consideration, for the security and disposition of property, and the state had no right to impair this obligation without violating the national constitution. (4 Wheaton 518.)

QUESTIONS

In what ways may third parties become liable for the performance of a contract?

State the ways in which a contract may be assigned. Is the assignment itself a contract? Name the essentials necessary to make a valid assignment. What contracts can not be assigned? Give specific reasons.

If an assignment of a contract is made, when must it have the consent of the other party to the agreement? When is that assent not necessary?

When an assignment is made what rights does the assignee acquire? Before accepting an assignment, what particular information, if any, should be obtained?

Write a contract making an assignment of the salary in Problem No. 54.

In what way does the Constitution of the United States dignify the importance of contracts? In what respect is this particular provision applied? What is the story of the Dartmouth College case?

What is the meaning of (1) assignment; (2) transfer; (3) assignor; (4) assignee; (6) transferee.

CASE PROBLEMS

Case problem No. 54.—Rice had a contract to work for Price for a year, receiving a salary of \$125.00 a month. Can Rice assign this salary to Jaundice before it is earned? Can he assign it after it is due without first getting Price's consent?

Case problem No. 55.—Roe entered into an agreement with Mellon to dig an oil well on Mellon's land. Roe assigned this contract to Allen who had the well dug in a workmanlike manner. Mellon refused to pay for the work contending he had not contracted with Allen. Decision? (172 Pa. At. Rep. 442.)

Case problem No. 56.—Dr. Skinner acted as physician for Stone for one year. The doctor was to receive \$500 for this service. He assigned his claim for this money to Sharp. Stone was informed of the assignment but refused to pay the money to Sharp. Can Sharp recover judgment against Stone?

CHAPTER XI.

HOW TO DRAW A WRITTEN CONTRACT.

54. **Formal articles of agreement.**—While the law does not require contracts to be reduced to writing (except those expressly provided by statute), it is particularly desirable to do so in business transactions of importance. That which is written does not change. Written contracts prevent disputes as to just what was agreed upon; they prevent an opportunity for false swearing in case of litigation, or at least, conflicting testimony. In case of the death of one of the parties the written instruments can be used as evidence if necessary. If care is exercised in expressing the intention of the parties in language that states exactly what is meant, there is no reason why a business man should not be competent to prepare ordinary contracts incidental to his business. To this end a few suggestions are herewith given:

(1) It is not necessary that the written instrument be set out in legal phraseology. Legal terms and technical language should be avoided. The writing may be in lead pencil; even the signature of the parties may be with the same instrument. Printed matter when employed as evidencing the intention of the parties will be equally good as if done with a pen.

(2) Before the agreement is reduced to writing, there should be a thorough understanding as to the intentions of the parties, the terms, and other conditions. After a contract is executed, if litigation should arise, expressions that are ambiguous will be construed against the one who wrote the document.

(3) The agreement should be signed by both parties. In a few instances, witnesses are required. After the contract is reduced to writing and is signed, one of the parties to it will not be permitted to prove by oral testimony that the contract is different from what it was intended it should be. It is a rule of law that the terms of a written contract can not be contradicted, enlarged, or varied by parol evidence. Their final understanding is based on what is put in "black and white." This does not prevent making a new contract or subsequently changing the old one by an oral agreement—if both parties are willing.

The foregoing rule does not exclude oral testimony to prove fraud, duress, undue influence, mistake, and the like.

A person who voluntarily signs a contract is presumed to

have understood and agreed to its terms. He is bound by it whether he read it or not, provided he was not prevented by fraud from reading it.

"A written contract is the highest evidence of the terms of an agreement between the parties to it, and it is the duty of every contracting party to learn and know its contents before he signs and delivers it. If one can read his contract, his failure to do so is such gross negligence that it will estop him from denying it, unless he has been dissuaded from reading it by some trick or artifice practiced by the opposite party. If he can not read it, it is as much his duty to procure some reliable persons to read and explain it to him, before he signs it, as it would be to read it before he signed it if he were able to do so, and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents." (83 Fed. Rep. 437.)

(4) The first paragraph should ordinarily contain the date, the names of the parties, and their place of residence. If there is likely to be any question as to the identity of the parties, they may be introduced and designated as *party of the first part* and *party of the second part*, and they should afterwards be referred to by these titles. This tends to avoid confusion in distinguishing the two parties, especially if either party consists of several persons.

The second and additional paragraphs should set forth in specific detail the particular things to be done, or not to be done. These specifications should be arranged in methodical order for convenient reference and to prevent ambiguity. The consideration for the performance of the agreement should be indicated. Any other information essential to a complete understanding should also be fully expressed.

The closing paragraph is a formal statement referring to the signatures of the parties to the contract, with their names written underneath. If the contract be witnessed, there should be a statement at the left of the names of the contracting parties: "Signed in the presence of," and the name of the subscribing witness placed beneath this phrase.

The party signing a contract usually writes his name with his own hand. Still, if another writes it for him, in his presence and at his request, this will be sufficient.

Duplicate, or carbon copies should be made and be signed by all the parties to the agreement so that each of them may have a copy. Pending the performance of some obligation, it may be required that the contract be placed in the hands of another. This is known as *escrow*. It is particularly desirable to retain duplicate copies of such agreements.

§ 55. **Form of contract.**—A general form of an agreement is here given. It illustrates a common arrangement sufficient for many purposes:

CONTRACT.

This agreement, made and entered into on this the 10th day of May, 1914, by and between A. F. Cooper, of Alexandria, State of Virginia, party of the first part, and William Bell, of Reading, Pennsylvania, party of the second part:

WITNESSETH: That the said party of the first part, in consideration of two hundred tons of Lehigh coal, sold to him this day by the said party of the second part, and by him agreed to be delivered to the party of the first part, at Alexandria, free of all charges and expense whatsoever, on or before the first day of October next, shall pay to the party of the second part within thirty days after such delivery, the sum of one thousand dollars.

And the party of the second part, in consideration of the foregoing agreement of the party of the first part, promises and agrees to forward and deliver, on or before the first day of October next, at his own expense, the said two hundred tons of Lehigh coal, and hereby warrants the same to be in good order and condition for use, free from slate, stones and impurities.

In witness whereof the parties of the first and second parts have hereunto set their hands on this the date first above written.

A. F. Cooper
William Bell

Exercises in Drawing Written Contracts.

Exercise 1. C. W. Keeland & Company, Springfield, Ill., agree to furnish the city treasurer, J. A. McMillian, for the use of the city, all coal to be consumed in the public buildings, and hay and grain for feeding the stock belonging to the city, at the following prices: No. 1 hay, \$17.00 per ton; No. 1 corn, 60 cents per bushel; oats, 37 cents per bushel; mixed feed, \$1.10 per sack; lump coal, \$4.00 per ton; egg, \$3.70; slack, \$2.00. Goods to be delivered on the day ordered and settlement to be made on the first day of the following month. The contract to be in force for five months from date of making.

Exercise 2. On the first day of February, 1913, Johnson & Brown, wholesale merchants, Sioux City, Iowa, employ C. A. Smith of the same place as a traveling salesman at a yearly salary of \$2,400.00, payable in monthly instalments of \$200.00, provided his monthly sales average \$2,000.00, and an additional allowance of \$50.00 per week for traveling expenses. Mr. Smith is to give his entire time and attention to the business, forward each day a list of the customers called upon, and to waive his right to his monthly salary in the excess of the allowance for traveling expenses, if his monthly sales fall below the required average. The agreement is to be in force for two years from date.

Exercise 3. Draw a contract by which you agree to work as a bookkeeper for F. G. Robinson, who conducts a general merchandise store at 221 Main Street, your city, at \$18.00 per week, with two weeks' vacation during the month of July, and a ten per cent. discount on all goods bought for your personal use. The position of bookkeeper being of a confidential nature, it is agreed that you are not to disclose any of the correspondence or other affairs of the business to any person other than the proprietor. The books are to be kept posted up to date, and a financial statement is to be rendered at stated intervals.

CHAPTER XII.

TERMINATION OF CONTRACTS.

§ 56. **Ways of terminating a contract.**—There are various methods by which the rights and duties created by a contract may be terminated or discharged. The most general ways seem to be the following:

- First. Agreement of the parties;
- Second. Performance;
- Third. Impossibility;
- Fourth. Bankruptcy;
- Fifth. Breach.

§ 57. (1) **Termination by agreement.**—The parties to a contract may provide for its termination at the time of the formation, or by a subsequent agreement. There may be an express provision that it shall cease upon the happening of a specified event, as the giving of two weeks' notice by either party. It may provide for its own termination, as in the case of an insurance policy which stipulates that in case of increased risk the policy becomes void.

Robinson made a contract with the Mutual Life Insurance Company which provided that if the former should fail to write \$10,000 worth of insurance during any three months the contract would cease thereafter. Robinson failed to write the required amount during the specified time and the contract was thereby terminated without notice.

The parties to a contract are free to make any changes they may choose, provided both parties are willing. They may agree to cancel the old contract entirely, or they may substitute a new agreement for an existing one. In the latter case, if one of the parties has already completed what he is to do, there must be some consideration for the release of the other party.

The extinguishment of a former obligation by substituting another contract is termed in law *accord and satisfaction*.

Murphey contracted to build a house for Johnson according to certain plans and specifications, for which the latter was to pay \$5,000 when it was completed. By the time Murphey had excavated the cellar, Johnson decided to move out of the community and did not wish to have the house built. He offered Murphey \$300 for the work already done, provided he would release him from his contract. Murphey accepted the proposition. This terminated the original contract.

§ 58. (2) **Performance.**—The normal method of terminating a contract is by the performance of all its provisions by both parties. The contract is then executed. Either party is dis-

charged from his obligation as soon as he has done all that he has agreed to do. But the discharge of the one party does not release the other, if there is something remaining to be performed on his side.

(a) *Payment*.—The payment of the amount actually agreed upon between the parties discharges the contract. The payment of the full amount due furnishes a complete performance. The contract may provide that payment is to be made in negotiable paper or by a transfer of land, personal property, or securities. Money is the ordinary medium of payment. When the contract calls for payment in money, the one to whom it is due need not accept a check, note, or property.

Accepting a check or note is merely a conditional discharge of the obligation contingent upon the payment of the check when presented at the bank or of the note when due, unless there is an express agreement of the parties otherwise.

(b) *Tender*.—An offer to pay a sum of money in satisfaction of some claim is termed a *tender of payment*. Its acceptance is a payment, and discharges the one making it, but its refusal does not release the obligation. It simply releases the liability for costs and interest that may accrue after the tender was made. It will, therefore, be observed that “chimney corner law” advising that the offer to pay cancels the debt whether the other party accepts it or not is not so in actual law.

The requirements of a valid tender are:

First. The full amount of the actual debt due must be tendered; anything less is of no effect. It need not necessarily be the exact sum, but may be an amount in excess of the debt, if the creditor can take exactly what is due from the amount offered without being called upon to give change.

Second. The tender must be unconditional. If some condition is annexed, like requiring a receipt in full of account, or of all demands, or the like, the tender is not good. This does not prohibit a demand for the return of the instrument of indebtedness or for a receipt for the exact amount paid.

Third. The money must be actually offered. It is not sufficient to express a willingness to pay, but the money must be produced and offered, unless the creditor waives its production or renders it impossible by his refusal to examine or accept it.

Fourth. It must be in legal tender currency. By this term is meant money that may be legally offered in payment of debts. If the tender be made in bank notes and no objection is offered, it will be sufficient.

Fifth. The tender must be kept alive. This means that if it be properly made and is rejected, the money must be kept in

readiness for the creditor on his demand, even to bringing it into court for the use of the plaintiff, if suit is subsequently instituted.

Legal Tender.¹

§ 59. **Definition of the term legal tender.**—Money of a character which by law a debtor may require his creditor to receive in payment, in the absence of any agreement in the contract or obligation itself. (Bouvier's Law Dictionary.)

Gold coins. The gold coins of the United States are a legal tender in all payments at their nominal value when not below the standard weight and limit of tolerance provided by law for the single piece, and, when reduced in weight below such standard and tolerance, are a legal tender at valuation in proportion to their actual weight.

Standard silver dollars are a legal tender at their normal value for all debts and dues, public and private, except where otherwise expressly stipulated in the contract.

Subsidiary silver coin. The silver coins of the United States of smaller denominations than one dollar are a legal tender in all sums not exceeding ten dollars, in full payment of all dues, public and private.

Minor coin (coins of copper, bronze, or copper-nickel). Minor coins are a legal tender at their nominal value for any amount not exceeding twenty-five cents in any one payment.

United States notes (known as legal tender notes, or "greenbacks"). They are a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest on the public debt.

Demand treasury notes, authorized by the Act of July 17, 1861, and the Act of February 12, 1862, are lawful money and a legal tender in like manner as United States notes.

One and two year notes of 1863. These notes, redeemable one year from date and two years from date, bearing interest at five per centum per annum, are a legal tender for their face value, exclusive of interest.

Compound interest notes. These notes were payable at any time after three years from date, and bearing interest not exceeding seven and three-tenths per centum, payable in lawful money at maturity, or, at the discretion of the secretary of the treasury, semi-annually; and such of them as should be made payable, principal and interest, at maturity, to be a legal tender to the same extent as United States notes for their face value, excluding interest.

¹ Memorandum issued by Treasury Department.

Treasury notes of 1890 are a legal tender in payment of all debts, public and private, except where otherwise expressly stipulated in the contract, and are receivable for customs, taxes, and all public dues.

Columbian half dollars are a legal tender to the same extent as subsidiary silver coin, i. e., ten dollars in any one payment.

Columbian quarters are a legal tender to the same extent as subsidiary coin, i. e., ten dollars in any one payment.

Not Legal Tender.

§ 60. **Gold certificates and silver certificates** are not a legal tender. They are receivable for customs, taxes, and all public dues.

National bank notes are not a legal tender. They are receivable at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States, except duties on imports; and also for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt, and in redemption of the national currency.

Federal reserve notes are an obligation of the United States and shall be receivable by all national and federal reserve banks and for all taxes, customs, and other public dues.

Trade dollars are not a legal tender. By the Act of February 12, 1873, they were a legal tender at their nominal value for any amount not exceeding five dollars in any one payment, but under date of July 22, 1876, it was enacted that the trade dollar should not thereafter be a legal tender.

Fractional currency is not a legal tender. Note.—It was receivable for postage and revenue stamps, and also in payment of any dues to the United States less than five dollars, except duties on imports.

Foreign gold and silver coins are not a legal tender in payment of debts.

Continental currency. The question has been raised and disputed as to whether what was called the "Continental Currency," issued during the War of the Revolution by the old government, was or was not legal tender. The facts appear to be that while the Continental Congress did not by any ordinance attempt to give it that character, they asked the States to do so, and all seem to have complied except Rhode Island. The Continental Congress only enacted that the man who refused to take the money should be deemed an enemy of his country.

CHAPTER XIII.

TERMINATION OF CONTRACTS.—CONTINUED.

§ 61. **Impossibility of performance.**—In a former topic it was shown that legal or physical impossibility existing at the time a contract is made, renders it unenforceable. (See § 43.) If one contracts to do a thing possible at the time, he must pay in damages to the other for his failure to do so, though his breach is the result of conditions arising later, which made it impossible for him to perform. Therefore, unforeseen difficulties do not excuse an obligation.

Defendant agreed to build a house for the plaintiff by the 1st of May, and had it nearly completed, when on the 27th of April it was struck by lightning and destroyed. The defendant was held liable in damages for the nonperformance of his contract. If he did not wish to be so held he should have excepted his liability on account of such a loss.

§ 62. **Subsequent impossibility.**—The contract will be terminated if it has become impossible by events arising subsequently to its formation in the following cases:

(1) *Destruction of subject-matter.*—Where the very nature of the performance is dependent upon the existence of some specific thing its destruction terminates the contract.

Roe agreed to make a violin for Doe out of a particular piece of lumber, furnished by the latter for that purpose. Through no fault of Roe's a fire destroyed the lumber furnished. The contract was terminated and Roe was not liable for damages.

(2) *Changed laws.*—A change in the laws of the country where the contract is to be performed will discharge the contract, if such change prevents the performance of the contract.

A tenant agreed to rebuild if the premises were destroyed by fire. A subsequent ordinance prevented the erection of wooden buildings in that district. His contract did not provide for any other kind of building, and he was therefore released from his contract.

(3) *Death or disability.*—If the contract is for the performance of some personal service, the death or disability of the promisor will terminate the agreement.

Devoe agreed to paint Jackson's picture. Devoe's health failed so that he was unable to keep his agreement. His incapacity discharged the contract.

(4) *Act of law.*—An impossibility created by an act of law discharges the contract.

Defendant agreed to work one year for the plaintiff. At the end of a month he was arrested, convicted, and sentenced to jail for a year. This terminated the contract, since the law made it impossible for him to act.

(5) *Act of the parties.*—If the party to whom the performance is due makes it impossible for the other to act, the latter will be relieved.

Sayles contracted to paint Braun's house within a certain period. Braun was doing the carpenter work on the building and failed to complete it—in fact, did not do any of it. This excused Sayles from any liability.

§ 63. **Termination by bankruptcy.**—The term *bankruptcy* implies a failure or inability to pay just debts. The Constitution of the United States confers on congress power to establish uniform laws on the subject of "bankruptcy" to be operative throughout the states. The design of these laws is to enable honest persons unable to pay their debts to be discharged from their contractual obligations by a legal declaration of insolvency. This is done by a judicial proceeding in which the property of the bankrupt is applied to the payment of his creditors. An equitable distribution of the assets gives no unfair preference of one creditor over another, large or small, near or far distant. A valid discharge releases the bankrupt from legal liability for his indebtedness. This does not prevent a revival of his obligations by making new promises to pay them.

Origin of Bankrupt Laws.—The English word *bankrupt* is derived from the Italian, *banca rotta*, meaning a broken bank or bench. The term first appeared in the laws of Henry VIII, A. D. 1542, but then only in the title of the act "An act against such persons as do make bankrupts." This was especially aimed at dishonest and not unfortunate debtors and not against traders in particular. While it provided for seizing their goods and dividing them among the creditors, it did not discharge or afford any relief to the debtor from his unpaid creditors. In 1694 the "Insolvent Debtor's Act" was enacted whereby other persons than fraudulent traders might obtain relief from imprisonment (but not from debt) by surrendering their assets.

The bankruptcy system of the United States is now embodied in the National Bankruptcy Act, passed in July, 1898, and since amended several times. There had been four bankrupt laws previously enacted by congress. It is said the reason the first one proved unpopular was because it followed too closely the English law. Each state has the power to pass similar laws when congress does not exercise the right. State statutes relating to the subject are generally called *insolvency laws*. Such legislation is inoperative when the federal statutes are in force. A state bankrupt law would affect contracts made in and between citizens of that state, and no others.

§ 64. **Who may become bankrupts.**—(a) Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

(b) Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unin-

corporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts.

The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a state or territory or of the United States.

A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

§ 65. **Acts of bankruptcy.**—Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, . . . or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States; or (5) admitting in writing his inability to pay his debts and his willingness to be adjudged a bankrupt is an act of bankruptcy.

§ 66. **Duties of bankrupts.**—The bankrupt shall attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; comply with all lawful orders of the court, . . . and file with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, . . . submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and,

in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Debts not affected by a discharge.—A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

§ 67. **Termination by breach.**—When one of the parties breaks a contract by failing or refusing to fulfill his obligations, the other party may be discharged from further performance. He may likewise be discharged if the first party makes it impossible for the other to perform.

To constitute sufficient grounds to terminate the contract, the breach must be of some detail of material importance; it must go to the very root of the matter. A mere failure to do something of minor consequence, collateral to the main contract, will not release the other party; he may recover damages for the breach, if injured. The law does not recognize trivial matters.

Plaintiff agreed to build a house for the defendant and have it completed by the first day of August. He did not get it done until the tenth day. This was a substantial performance and the defendant was not discharged by the delay. This was true, although time is said to be "the essence of the contract."

When a party to a contract positively repudiates his agreement, the other party has an immediate right to bring a suit for damages. But whether he brings a suit then or later, he has no right to increase the damages of the defaulting party by continuing performance after the receipt of such notice.

Defendant entered into an agreement to sell his running horse, named Jim, to the plaintiff on the first day of November. On the second of July he sold the horse to Roe. The plaintiff had a right to bring a suit to recover damages as soon as the horse was sold to Roe.

Thomas Tatum made a contract with John Jones to manufacture and construct a fence around the former's farm. When Jones had part of the fence made, Tatum rescinded the order. Jones would be entitled to recover his profit on the entire job, but he would not be permitted to increase Tatum's damages by performing the entire contract after getting the order to stop.

§ 68. **Remedies for breach of contract.**—When a contract is broken, the party who is injured by the breach may recover in money from the other for the damages he is deemed to have suffered. Damages may, therefore, be defined as a pecuniary compensation recoverable for a breach of contract. They are awarded as compensation and not as punishment.

§ 69. (1) **Measure of damages.**—The injured party, as a general rule, is entitled to be placed in the same position, so far as money is concerned, as if the contract had been performed.

(a) If the breach results in a failure to pay money, the damages would be the amount of money due with interest at the legal rate from the time it became due.

(b) If the breach is the result of a failure to deliver personal property sold, the damages will be the prospective profits that would have been realized but for the fault of the defaulting party.

(c) When the seller of personal property holds the property for the purchaser, on account of the failure of the latter to accept, then the entire contract price will be the amount due. Or if the seller retains the property as his own, he can recover the difference between the market price and the contract price. If the seller elects to resell the property, he can recover the difference between the first selling price and the amount received.

(d) An employee discharged before the end of the term of his employment may recover the full amount of the wages he would have received from the time of his discharge until he secured other employment, within the contract period. But he must make an effort to secure other employment, and all money earned in other employment would go to reduce the damages to which he would otherwise be entitled.

§ 70. (2) **Liquidated damages.**—The parties may fix upon an agreed amount at the time of entering into the contract, the compensation to be paid by either party, in case of a default. This is known as *liquidated damages*. If the amount is reasonable, the courts will enforce such stipulations. If the amount is unreasonable—out of all proportion to the actual damages—it will be regarded as a penalty, and the courts will not enforce it.

The Wallis Iron Works agreed to build and have completed a grandstand for a race course on or before a certain date or pay \$100 for each day thereafter that it remained uncompleted. It was agreed that the amount was to be paid as damages and not as a penalty. This grandstand was a very extensive enterprise, costing \$133,000 to build. The court held that the damages agreed upon in advance were not unconscionable. (55 N. J. L. 132.)

The defendant formerly owned a drug store in a city of 30,000 inhabitants. He had a good trade throughout the city. He sold the business to plaintiff and agreed not to engage in the same business in that place for a period of five years, and in the event of doing so the defendant agreed to pay the plaintiff the sum of \$3,000. Before the expiration of the five years the defendant broke his agreement by engaging in the drug business in the same place. The plaintiff sued the defendant for damages but failed to show that he was actually damaged.

Should the plaintiff be entitled to recover any damages? Do you think he can recover the amount agreed upon?

§ 71. (3) **Specific performance.**—If the damages to be recovered would be an inadequate remedy, special relief, termed

specific performance, is sometimes granted the injured party. By specific performance is meant the actual performance of a contract by the party bound to perform it. This is an order from an equity court requiring the party to carry out his contract, or in other words decreeing specific performance of the agreement. In the case of personal property, damages are usually considered sufficient compensation. If the personal property consists of some patented article or rare work of art that can not be obtained elsewhere, specific performance will be awarded. The rule is more generally applied to contracts for the sale of real property than it is to personal property.

Anderson desires to obtain 1,000 shares of stock in a certain corporation, for a particular purpose and Brown agrees to sell him 10 shares, which are the last obtainable, and which will make up the desired number for Anderson. Upon Brown's refusal later to transfer the 10 shares a court of equity will compel the transfer.

In order that a court may make the decree of specific performance it is essential that:

(1) The contract be founded upon a consideration, and this consideration must be proved.

(2) The enforcement of the contract must be practicable.

(3) The enforcement of the contract must be actually necessary to the plaintiff, and not oppressive to the defendant.

(4) If the contract must be in writing by the Statute of Frauds, it must comply with that requirement, if specific performance is sought.

§ 72. (4) **Statute of limitations.**—The right to bring a suit for damages for a breach of contract is put to an end by a lapse of time. If the party injured does not exercise this right within the prescribed time, the debt is said to be "outlawed," and he will be barred from his rights. This time is fixed by "statutes of limitation." If it were not for these statutes, a plaintiff might delay bringing his action until the defendant had lost the evidence on which his case rested. A dilatory claimant deserves no assistance. The debt may be kept alive or be revived by a part payment, a payment of interest, or by a new promise to pay. Nearly all the states require the promise to be in writing, but in some jurisdictions an oral promise is held to be sufficient. The period begins to run anew from the date of its revival.

Cott owed Cochrane a debt of \$603.03 which was long past due and about to be barred by the Statute of Limitations. Upon a request for payment Cott wrote a letter in which he stated his inability to pay at that time and hinted at a hope of paying in the future. Cochrane construed the letter as sufficient acknowledgement of the debt to revive the debt and take it out of the statute. The court held that a letter stating that the debtor hoped to be able to make some money was too vague and uncertain to constitute an admission of an existing indebtedness. (138 S. W. 46.)

Statute of Limitations.

	Notes	Open Accts.	Judgments
Alabama.....	6	3	20 years.
Arizona.....	4	3	5 years.
Arkansas.....	5	3	10 years.
California.....	4	4	5 years.
Colorado.....	6	6	20 years, Court of Record.
Connecticut.....	6	6	No limitations.
Delaware.....	6	3	20 years.
Dist. of Columbia.....	3	3	12 years.
Florida.....	5	3	20 years.
Georgia.....	6	4	7 years.
Idaho.....	5	4	6 years.
Illinois.....	10	5	20 years.
Indiana.....	10	6	20 years.
Iowa.....	10	5	20 years, Court of Record.
Kansas.....	5	3	5 years.
Kentucky.....	15	5	15 years.
Louisiana.....	5	3	10 years.
Maine.....	6	6	20 years.
Maryland.....	3	3	12 years.
Massachusetts.....	6	6	20 years.
Michigan.....	6	6	10 years, Court of Record.
Minnesota.....	6	6	10 years.
Mississippi.....	6	3	3 years.
Missouri.....	10	5	10 years.
Montana.....	8	5	10 years, Court of Record.
Nebraska.....	5	4	5 years foreign.
Nevada.....	6	4	6 years.
New Hampshire.....	6	6	20 years.
New Jersey.....	6	6	20 years.
New Mexico.....	6	4	7 years.
New York.....	6	6	20 years.
North Carolina.....	3	3	10 years.
North Dakota.....	6	6	10 years.
Ohio.....	15	6	21 years foreign, 15.
Oklahoma.....	5	3	5 years.
Oregon.....	6	6	10 years.
Pennsylvania.....	6	6	20 years.
Rhode Island.....	6	6	20 years.
South Carolina.....	6	6	20 years.
South Dakota.....	6	6	10 years.
Tennessee.....	6	6	10 years.
Texas.....	4	2	10 years.
Utah.....	6	4	8 years.
Vermont.....	6	6	8 years.
Virginia.....	5	3	20 years.
Washington.....	6	3	6 years.
West Virginia.....	10	5	10 years.
Wisconsin.....	6	6	20 years.
Wyoming.....	10	8	10 years.

QUESTIONS

Name the five general ways in which a contract may be terminated,

Consult a dictionary for the meaning of (1) terminated; (2) discharged; (3) performance; (4) breach; (5) extinguish; (6) subsequent; (7) accord; (8) satisfaction of a contract.

Name the several ways in which a contract can be terminated by agreement.

By a new agreement may a contract be discharged before any part of it is performed? After a part is performed? What is the effect of the modification of a contract?

In what ways may a contract be terminated by performance? Give several examples of contracts discharged by performance.

What is the meaning of tender of payment? What are the requirements of a valid tender? What specific kinds of money are legal tender? What is money?

Do unforeseen difficulties or climatic conditions render the performance of a contract unenforceable? How can one obviate responsibility for unforeseen difficulties, as the freezing of a river in midwinter, or a strike of mechanics?

Name the several ways in which subsequent impossibility may terminate a contract.

What is meant by (a) bankruptcy; (b) insolvency? When is a man said to be insolvent? Make a brief statement of the origin of the bankrupt laws. Who may become a bankrupt? Enumerate the acts of bankruptcy. Does bankruptcy completely discharge a contract? Name some of the duties of a bankrupt. What debts are not affected by a release or discharge in bankruptcy?

Explain the meaning of **breach of contract**. Name some of the ways under which a contract may be terminated by a breach. What is the result of a minor failure?

What is the ordinary remedy for a breach of contract? Are damages awarded as compensation or a punishment? What are liquidated damages?

What is meant by specific performance? Give several examples. What condition must exist before a court will award specific performance?

Explain the meaning of Statute of Limitations. Does this law invalidate a debt? (What is the meaning of invalidate?) What is the chief principle upon which this statute is based? What would be the probable result if there were no such statute? How can a debt be kept "alive?" What is an "outlawed" debt?

Write a recapitulation of the various chapters on contracts and submit to the teacher for approval.

CASE PROBLEMS

Case problem No. 57.—Duncan has a contract to build a fence for Smith for which he is to receive \$100.00. Before Duncan starts to build the fence, Smith changes his plans and decides he does not want the fence, and offers Duncan \$5.00 in settlement. If Duncan accepts the money is the contract discharged? If Duncan refuses the \$5.00 can he still proceed to build the fence and collect the original contract price? How much can he collect?

Case problem No. 58.—Peter Sterling owes Thomas Jefferson \$1,900.00. He tenders him the amount in silver dollars. Is the tender good and what will be the result if Jefferson refuses to take the money?

Case problem No. 59.—If A— offers B— \$100.00 in silver dollars in payment of a horse B— has offered to sell at that price must B— accept, or may B— stipulate the kind of money he must have?

Case problem No. 60.—In February, Richardson makes a contract to erect a frame building for Marshall, on the latter's lot, the building to be finished November 1 of the same year. Richardson is to pay \$25.00 liquidated damages for each day the building is unfinished after November 1. On October 25, when the building is nearly finished, it is destroyed by lightning, while on October 29 the city council passes an ordinance fixing the fire limits of the city forbidding the erection of frame buildings in that particular district. What are the respective rights of Richardson and of Marshall?

CHAPTER XIV.

NEGOTIABLE INSTRUMENTS

In General.

§ 73. **Nature and origin.**—Negotiable instruments, also called “negotiable paper” and “commercial paper,” is a term applied collectively to written contract obligations used in commercial transactions. They possess the peculiarity of negotiability, which causes them to circulate freely and which makes them so valuable in the business world. Their chief function is to take the place of money. To this end they are so favored in law that if properly executed and certain rules are adhered to, they may pass from hand to hand like the currency of the country and far more conveniently than actual cash. Before maturity, the genuineness of the instrument and the solvency of the parties are alone to be considered in determining their value. They have been truly termed “a courier without luggage.”

Negotiable instruments were anciently made use of in a limited way by the Athenians, brought to a high degree of perfection in Italy, later introduced into England, and from there came to this country with the adoption of the common law. They owe their origin to the customs and usages of merchants and traders. It was once thought that none but merchants could be parties to contracts of this kind, but this opinion long since became obsolete.

Competent parties.—The parties to a negotiable instrument may be divided into (1) original, or those who are named in the instrument, and (2) subsequent, or those into whose hands it may fall later.

The competency of these parties does not differ from the competency of parties to an ordinary contract. The original parties must be designated with certainty, so that he who is to pay may know to whom payment should be made; also that he who is entitled to receive payment may know from whom to demand it. Then again, the original parties must be the exact parties mentioned in the instrument. When a name is forged to a negotiable instrument it creates no legal liability against the person whose name is forged.

§ 74. **Negotiable Instruments Law.**—Within recent years forty-eight states and territories have adopted by statutory enactment what is known as the Negotiable Instruments Law. This act was prepared under the directions of commissioners on uniform state laws, and is designed to make the laws pertaining to negotiable instruments uniform throughout the different states. The attempt has been not to change the law heretofore existing, but to put it into a simpler and more orderly form. The essential provisions of the Negotiable Instruments Law have been incor-

porated so far as practicable in the following treatment of the subject.

§ 75. **Assignability.**—Assignability pertains to contracts in general. All ordinary contracts, except those for personal service, may be assigned from one person to another. When so transferred, the purchaser, or assignee, acquires merely the rights therein of his immediate predecessor, subject to all the defenses the debtor holds against the assignor. (See §§ 47 and 48.)

Winters secured a contract from the Acme Knitting Company for a number of knitting machines, which contract Winters later assigned to Richard Roe, for a valuable consideration. Winters made material misrepresentations in securing the order, but the company did not learn this until after the contract had been assigned. Richard Roe, nevertheless, will be liable for the misrepresentations made by Winters.

§ 76. **Negotiability.**—Negotiability is a term applied to only a special class of contracts which contain a promise to pay money. Its purpose is to give them a greater circulating value. Under certain conditions and limitations, the party to whom a negotiable instrument is transferred acquires a greater right than the one had who conveyed it. The subsequent holder may get a perfect title to the paper, while the transferer's title may have been imperfect. Hence, the transferring of a negotiable instrument is an exception to the general rule that the seller can give no better title than he himself has.

If a negotiable instrument is payable to bearer, it will pass title by delivery; and if it is lost or stolen, the person taking it from the thief or finder, for value and without knowledge of theft or loss, will be entitled to retain it against the true owner. The person who has it in his possession is presumed to own it. The holder of a negotiable instrument may enforce its payment in his own name.

White gave to Black a promissory note for one hundred dollars, payable in sixty days. After giving the note, White discovered that through a series of business dealings Black really owed him five hundred dollars. White may, at the end of sixty days, refuse to pay Black the amount due on the note, but instead may demand four hundred dollars from Black. Suppose, however, that Black had meanwhile sold the note to Green, who knew nothing of Black's indebtedness to White. White will not be permitted to set off Black's debt, but will be obliged to pay Green the amount of the note, and look to Black for his money due from him.

§ 77. **Holder in due course.**—A negotiable instrument is not fully effective until it has passed into the hands of third persons. In order that the holder may be entitled to the full benefit of negotiability he must be a "holder in due course," a term employed in the Negotiable Instruments Law as a substitute for the more involved term, "bona fide holder for value without notice before due," previously used. A holder in due course is

one who has taken the instrument under the following conditions:

First. That the instrument is complete and regular on its face.

Second. That the instrument must not be overdue.

The face of the instrument conveys the information whether it is past due or not. If it is payable at a fixed time, its due date is certain; if payable on demand, it is due a reasonable time after issued. A transfer on the date of maturity is not considered a transfer when past due.

A note past due raises a suspicion that should put the purchaser on his guard; and if transferred after maturity the purchaser will take it subject to existing claims.

Black made a note in favor of White, or order, payable May 1. The note was not paid when due. Some time later the maker paid White the amount of the note, but neglected to get the note as a receipt. Soon thereafter White transferred the note to Green for a valuable consideration and without notice of the previous payment. It was held that Green should not be entitled to recover from Black. (3 Term. Rep. 80.)

Third. That he took it in good faith and for value.

Good faith is absence of knowledge on the part of the purchaser of the facts which constitute the defense to the instrument. When he has notice of defects, he is a purchaser in bad faith. Where the holder offers to accept for a negotiable instrument a sum so small that a reasonable interpretation would be that there is something wrong with it, the courts will treat it as bad faith in the absence of inquiry on the part of the purchaser.

Where a promissory note for \$300.00 was purchased for \$5.00 and the maker was in fair credit and able to pay his obligations, it was held that the element of good faith necessary to a holder in due course was entirely lacking. (22 Wis. 451.)

Value means any legal consideration sufficient to support a simple contract. Examples are the payment of money, the surrender of property, a promise to pay money, etc.

Fourth. That at the time the instrument was negotiated (transferred), the holder had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Notice means actual knowledge. It covers any information that a prudent person would gather from looking at the instrument, or that might have come through any other source.

The title of a person who negotiates an instrument is defective when he obtains the instrument or any signature thereto, by fraud, force, duress, or other unlawful means; or for an illegal consideration; or when he negotiates it in breach of faith or under circumstances amounting to fraud.

Defendants gave to John Doe & Co. a promissory note for \$630.00. The note was dated June 12, 1905, and was due on or before October 1, 1907, with interest at the rate of six per cent. per annum, payable annually. The note was given for the purchase of a threshing machine outfit. The note and contract were signed while the defendants were drunk (the whiskey being furnished by an agent for John Doe & Co.). The note and contract were not in accordance with the agreement made when the parties were sober.

On the 9th day of February, 1907, John Doe & Co. sold the note to the plaintiff, and it was held the latter was not a holder in due course for the reason that John Doe & Co. and the plaintiff were both residents of Ohio, where the note was sold and delivered; the defendants were residents of another state and were absolute strangers to the plaintiff. Furthermore, the plaintiff made no inquiry as to the financial standing or ability of the defendants to pay the note. In addition to the foregoing, the first year's interest on the note was long past due and unpaid. This was known to the plaintiff when he purchased the note as the amount of the interest was included in computing the value of the note at the time it was transferred. (136 S. W. 28.)

QUESTIONS

What does the term "Negotiable Instruments" include? What peculiarity do they possess, and what is their chief function? What are the three factors that determine the value of a negotiable instrument?

Outline briefly the origin of negotiable instruments. Who may be parties to this class of contracts? A negotiable instrument being a contract, name the essentials to contracts in general.

What is meant by the Negotiable Instruments Law? What is the particular purpose of this law? Has it been adopted in your state?

Explain what is meant by assignability; also transferability. What contracts may be assigned? (§ 48.) What rights, if any, are acquired by one to whom such a contract may have been assigned?

Define negotiability. In what respect does it differ from assignability. Give several concrete examples.

Can a thief convey title to a stolen instrument? Under what circumstances may the finder of a negotiable instrument give title so that the one taking it can retain it as against the owner?

When does a negotiable instrument become fully effective? Explain the meaning of a **holder in due course**. Name the conditions under which one may become such a holder. If a note were about to be transferred to you in payment of a debt would it make any difference to you whether or not the note was past due?

When is the title to a negotiable instrument defective? Why should this be the law? What particular maxim of law is here applicable?

What are some of the circumstances that should excite suspicion in the mind of a prudent man that he may not be an innocent holder? If the purchaser of a note refrains from making inquiry lest he become acquainted with the transaction in which it originated, is he a holder in good faith?

CASE PROBLEMS

Case problem No. 61.—Daniel Deronda was the holder in due course of two promissory notes for \$100 each. After purchasing the notes he ascertained they had been obtained by the payee without consideration. Deronda then sold the notes to Adam Bede for \$150, who was fully informed of all the facts. Is the maker of the notes liable to Adam Bede? If so, for how much?

Case problem No. 62.—Plaintiff gave a check in payment of a gambling debt but the next morning before banking hours he gave due notice to the bank not to pay the check when presented. It appears that the payee of the check had presented it to the cashier a short time before and had received the money. Is the bank liable?

Case problem No. 63.—McNamara bought a note from Dickens. The note was made by a man named Howe, who claimed it was obtained from him fraudulently by Dickens. McNamara was a holder in due course. Is he entitled to collect the note when due? (28 Wash. 461.)

Case problem No. 64.—Miller bought a note from Chase, giving in payment some cash and the balance in a check. Before the check was cashed Miller was told by Chase that the latter had obtained the note from Meyers by fraud. Is Miller a holder in due course? (46 Utah, 257.)

CHAPTER XV.

BILLS OF EXCHANGE.

§ 78. **Kinds of negotiable instruments.**—The most common forms of commercial paper in use today in business transactions are:

- (1) Bills of exchange;
- (2) Promissory notes;
- (3) Bank checks.

Bill of exchange defined.—A bill of exchange is a written order by one person upon another for the payment of a sum certain in money to a third person.

Other definitions.—A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, and requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time, a sum certain in money to order or bearer. (N. I. L.)¹

A bill of exchange is an unconditional written order by one person to another, directing him to pay a third person or his order or the bearer a sum of money therein named. (Tiedemann.)

Among business men a bill of exchange is usually called a draft, although the latter term is more specifically applied to domestic bills. A bill of exchange is also known as a "bill," and when it is accepted, it is termed an "acceptance."

The following is the common form of a bill of exchange:

\$ 236 ⁸⁷/₁₀₀

St. Louis, Mo., Jan 8, 1916

At Sight

Order of: Shawley Bros & Co

Two Hundred Thirty six Dollars

Pay to the

Value received and charge the same to account of

To: J. J. Barron

No. 25 Denver, Colo.

Southern Wfg Co

G. R. J.

NO PROTEST
TAKEN BY DRAWING

§ 79. **Form.**—A bill need not be framed in any particular form to be negotiable; the following was held to be a negotiable instrument:

"Mr. William Tebo will please pay to R. J. Torpey, or order, two hundred and fifty dollars, and charge to my account. Due October 1.

John Ryan." (184 Mass. 307.)

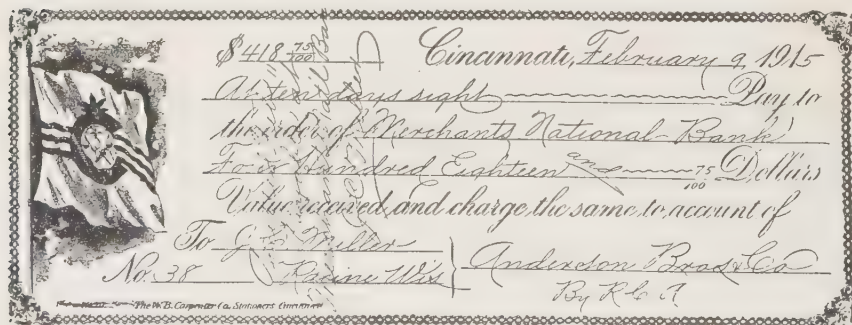
¹ Negotiable Instruments Law.

§ 80. **Parties.**—There are three original parties to a bill of exchange: (1) the one signing the bill, called the drawer; (2) the one who is asked to pay the money, called the drawee, who is also the acceptor when he assents to the terms of the order; and (3) the one to whom the money is to be paid, called the payee.

§ 81. **Foreign and inland bills.**—Bills of exchange are technically classified as foreign bills and inland bills. Bills drawn and payable in any other country or state are foreign bills. In this respect the states are considered foreign to each other. An inland bill is one both drawn and payable in the same state. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill. This distinction is made necessary if the bill is dishonored, and will be considered further under the subject of protest.

§ 82. **Time or sight drafts.**—A time draft indicates that the debt is not yet due the drawer, or that he wishes to allow the drawee additional time in which to make payment. They are usually written a certain time "after sight" or "after date." To become effective they must be accepted.

The following is the form of an accepted time draft:



A sight draft is one made payable at sight or whenever presented. It indicates that the amount owed the drawer is either due or past due, and he wishes it paid at once.

Trade Acceptance.—As defined by the Federal Trade Board, a trade acceptance is "a bill of exchange (time draft) drawn by the seller on the purchaser of goods sold, and accepted by such purchaser." The principal difference between a time draft and a trade acceptance is that the former is drawn and accepted at the expiration of the term of credit with the purpose of granting an extension of time, while the trade acceptance is drawn and accepted at the time of the sale, or soon thereafter.

The purpose of the trade acceptance is (1) to provide better evidence of the debt resulting from a credit sale than an open book account; (2) to provide commercial paper that may be discounted by the holder if desired; and (3) to encourage prompt payment on the part of the purchaser of goods.

The following is the form of a draft payable at sight:

NO PROTEST
Make this office payable

TRADERS NATIONAL BANK

\$249.15 — Kansas City Mo. January 14, 1915

At sight ————— Pay to the

order of ————— First National Bank

Two hundred and forty nine and 15/100 Dollars

Value received and charge to account of

To Donaldson, Trust

Knowsies, Inc. ————— J. Wilson Smith & Co.

1834 x 114

§ 83. **Original use of bills of exchange.**—Bills of exchange were originally used as a substitute for money to be sent to a distant place. Adams in Chicago owes Brown in Louisville a debt of \$500. Carter of Louisville owes Adams of Chicago an equal amount. Adams draws on Carter, asking him to pay the amount he owes Adams to Brown and sends the draft to Brown. Brown presents it to Carter, who pays the debt and retains the draft as a receipt. This use of bills of exchange is now about out of practice.

§ 84. **Present use.**—Drafts are now used principally as a collecting medium, some bank or collection agency being, in nearly all cases, the payee. In the foregoing example, Adams would send his check to Brown, and expect Carter to pay his debt in the same way. In case Carter did not do so, he (Adams) would draw a draft on Carter in favor of some bank, either in Louisville or Chicago, and send it to the bank to collect. If Adams did not pay his debt by check, Brown would draw on him in favor of some bank for collection.

§ 85. **Acceptor's contract.**—A draft drawn on the drawee is not binding upon him until he accepts it. If the drawee is willing to pay, he writes across the face "accepted," the date, and his name. A time draft must be accepted or returned as soon as presented to the drawee. The drawee is not obliged to accept unless he chooses, but once having accepted it, he is bound under the same obligation as the maker of a promissory note. He also acknowledges the genuineness of the drawer's signature, and the capacity and authority of the latter to draw the instrument for the amount stated.

§ 86. **The drawer's contract.**—The drawer of a draft who puts it into circulation before it is accepted, undertakes and warrants (1) that there is a drawee in existence; (2) that he is capable of accepting the instrument; (3) that he will accept it; and (4)

that he is at the place designated in the draft. If upon presentation by the holder for value, it turns out that the drawee is fictitious or refuses to accept, the holder has immediate recourse upon the drawer, not only for the amount of the draft, but for all damages he may suffer in his attempts to have the draft collected from the drawee.

The obligation of the maker or acceptor is quite different from that of the drawer or indorser. While the former is absolutely and unconditionally bound to pay the instrument at maturity without presentment of demand of payment by the holder, the drawer, or indorser is only bound to pay upon condition that the instrument is duly presented to the acceptor or maker, is dishonored by him, and that proceedings upon dishonor are taken by the holder.

§ 87. **Presentment for acceptance.**—When a bill of exchange is payable after sight, it must be presented to the drawee for acceptance, for the purpose of ascertaining whether he intends to pay it when due. If it is payable on a certain date, it need not be presented for acceptance; it will be sufficient to present it for payment on the day due. The holder may, if he wishes, present it before maturity. Indorsers and drawers of time bills will be discharged from liability unless payment is demanded of the acceptor on the day that it matures.

The presentment should be made during the business hours of a business day. It should also be made to the drawee personally at his place of business, and if he has no place of business then at his residence, but it should not be presented on a holiday.

After presentment has been made, if the drawee refuses to accept or pay the bill, it is said to be "dishonored." In such a case notice must at once be given to the drawer and indorser; otherwise they are discharged. This is for the purpose of giving the drawer and indorser an opportunity to take prompt measure to protect themselves. Furthermore, such dishonor gives the holder an immediate right of recourse against the indorsers and drawer, and he may sue them at once, although the bill is not yet due. If the drawee accepts a time draft when presented, the holder must also present it for payment when due, and if not paid it is likewise "dishonored." It must then be protested, and the proper notice given to the drawer and indorsers, if any, otherwise they will be discharged from their liability.

According to the Negotiable Instruments Law, presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary, in order to fix the maturity of the instrument;
2. Where the bill expressly stipulates that it shall be presented for acceptance;
3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

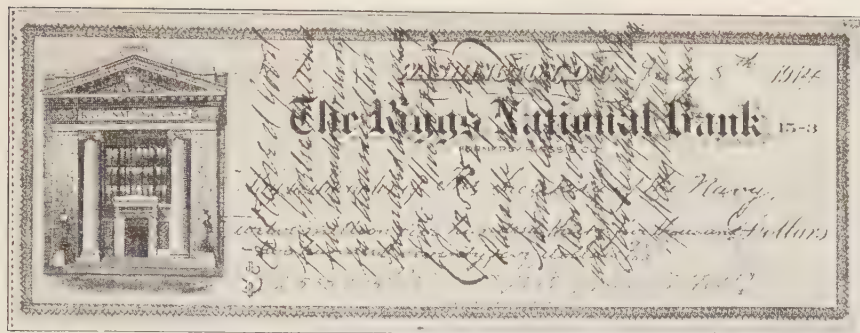


Photo by Harris & Ewing, Washington, D. C.

REPRODUCTION OF CHECK RECEIVED BY THE UNITED STATES GOVERNMENT IN PAYMENT OF TWO BATTLESHIPS.

QUESTIONS

What are the principal forms of commercial paper in daily use?

Define a Bill of Exchange. By what other titles are they known? If you have access to an encyclopedia look up the origin, early use, and development of Bills of Exchange. In what particular form must a bill be executed? How many original parties are there to such an instrument? Name them. What are the obligations of the several parties?

Be prepared to place on the blackboard a Bill of Exchange drawn in your city under present date. Designate the various parties and their relations to each other.

Explain in detail the original and modern uses of drafts.

In what respect does a foreign bill differ from an inland bill? How do bills differ as to time?

What is the meaning of the word "accepted" as applied to drafts? How accepted? What is the acceptor's contract? The drawer's contract? What does the drawer warrant? When and where must a bill be presented for acceptance? If the drawee refuses to accept, or pay the bill, what is the legal effect of such refusal?

CASE PROBLEMS

Case problem No. 65.—Wallace, of Denver, draws at ten days' sight on Brown, of St. Paul, and in favor of Clay, in St. Louis. Describe the movement of this draft from the time it leaves Wallace until it has been paid.

Case problem No. 66.—Black drew the following draft on White: "One month after date pay to the order of Black the proceeds of my apple crop in Peaceful Valley, Oregon." Is this a negotiable draft? If not, what is it?

Case problem No. 66a.—Clafin draws a draft on Peterson. Peterson writes across the face his signature and date. Is this sufficient to constitute a valid acceptance?

CHAPTER XVI.

PROMISSORY NOTES.

§ 88. **Definition.**—A promissory note is an unconditional promise in writing to pay a sum certain in money at a stated time to a designated person, or upon his order, or to the bearer.

A negotiable promissory note is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable time, a sum certain in money to order or to bearer. (N. I. L.)

Promissory notes are frequently called for convenience "notes." They are also known as "notes of hand."

§ 89. **Parties.**—A note has two original parties: (1) the one who signs the note (the one who promises to pay), called the maker; and (2) the one who is to receive the money (the person in whose favor the promise is made), called the payee.

The following is the form of an ordinary promissory note:

\$ 97.50
Allentown, Pa., April 14 1915
Thirty days after date, I promise to pay to
the order of Lee & Roberts

Ninety-seven 00/100 Dollars.
Without defalcation for Value received:
Ag 55 Due May 14 R. C. Gordon

§ 90. **Essentials.**—The requisites for a negotiable promissory note are:

- (1) It must be in writing and signed by the maker.
- (2) Must contain an unconditional promise to pay a sum certain in money.
- (3) Must be payable on demand or at a fixed or determinable future time.
- (4) Must be payable to order or to bearer.

An oral promise to pay money might be a good contract, but it would not be a promissory note. Also a written agreement which expresses an intention on the part of the maker to pay another a certain sum of money at a stated time, might be an

enforceable contract, but it would not be a negotiable note unless it complied with the foregoing conditions.

§ 91. **The maker's contract.**—The maker of a negotiable promissory note by making it agrees that he will pay it according to its terms and admits the existence of the payee and his then capacity to indorse.

He can be discharged from this liability only by its payment; by the intentional cancellation of it by the holder; by the lapse of the statutory period of limitation or by bankruptcy.

A due bill or an I. O. U. is preferable to an open running account against a party, as both amount to an admission of the debt by the maker, but a negotiable note is preferable to either, because the negotiable note might be transferable to an innocent purchaser, and such holder could recover against the maker even though the original holder could not. A negotiable instrument is likewise useful in that it may be put up as collateral security to borrow money; and if the maker is a solvent party, a negotiable note passes from hand to hand almost like money.

A promissory note is a formal acknowledgment of the correctness of the account which it covers. It is also due on a fixed date. The amount due on an open account may be in dispute. While an open account may be due at a certain time, agreed upon at the time of the sale, there is much more latitude allowed than in the case of a note. A debtor may not consider it a very serious thing to be a few days late in paying an open account, but it may seriously injure his credit if he does not meet the payment of his note on the day due.

§ 92. **Due bill.**—A due bill is an acknowledgment of an indebtedness, with no express terms in regard to the time or manner of payment. It is generally a simple memorandum stating an account and to whom due, and signed by the debtor, as, for instance:

*"Due John Doe, \$100.00.
(Signed) Richard Roe."*

Or the three letters "I. O. U." duly signed, or words to the same effect. These are not negotiable by the law merchant.

§ 93. **Joint and several note.**—In most jurisdictions a note signed by two or more makers is both a joint and several agreement of the makers to pay the note; that is, the holder may sue and recover from all of them in one joint action or he may sue them separately in several actions.

Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon, and where an instrument contains the words "we promise to pay" and is signed by one person he is individually liable.

The following is the customary form of a joint note:

(Chicago, Ill. June 4, 1915)	
I, <u>Seamont</u> , after date for value received, well promise to	
pay to the order of <u>South Western Publishing Co.</u> \$ <u>469.25</u>	
<u>Four Hundred Sixty-nine and 25/100</u> Dollars	
At <u>First National Bank</u>	
with interest at the rate of <u>7 per annum</u> from date until paid and	
<u>10 per cent additional on principal and interest unpaid for Attorneys Fees.</u>	
if placed in the hands of an Attorney for Collection.	
The Drawers and Endorsers severally waive presentment for payment, protest and notice of protest and nonpayment of this note.	
No. <u>361</u>	<u>Rudolph Mahew</u>
Due <u>December 4</u>	<u>Simon Schmid</u>

A joint and several note expresses that the makers jointly and severally promise to pay. They are individually and collectively liable for the payment of the note. The holder may collect the full amount from either signer without proceeding against the other, if he so chooses. The makers are liable jointly, that is, together, or they may be liable severally, that is, separately. Each of them has assumed full liability for paying the whole amount. Such a note may begin, "We, or either of us, promise," or "We jointly and severally promise." A note beginning "I promise" and signed by two makers is a joint and several note.

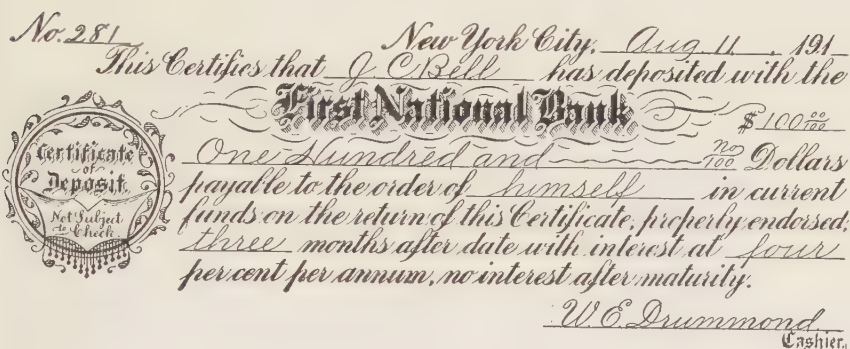
The following is the form of a joint and several note:

"\$500. Albany, N. Y., January 1, 1914.
One month after date I promise to pay (or we jointly and severally promise to pay) John Doe Five Hundred Dollars, value received.

Richard Roe,
Peter Sterling."

§ 94. **Certificate of deposit.**—A certificate of deposit is a receipt for money deposited in a bank, with a promise to hold it or pay it, as may be agreed upon between the parties. It is generally issued by banks to customers who deposit money on time for a low rate of interest. They are in legal effect, if not in form, promissory notes, and the principles applicable to notes should be applied to certificates of deposit.

The following is the form of a certificate of deposit:



§ 94a. **Bonds.**—Bonds are contract obligations, more formal than promissory notes, on the part of a corporation, a municipality, or a government, to pay money. If they are in the proper form they are negotiable. Bonds may be either “registered” bonds or “coupon” bonds. They are registered to guard against their loss or destruction. This is accomplished by recording the names of the owner of each bond in the books of the corporation or government. A bond is transferred to the ownership of another upon the indorsement upon the back by the owner and purchaser, and the recording of the name of the transferee. The interest is sent to the person in whose name it is registered.

Coupon bonds are so called because coupons are attached to cover the payment of interest.

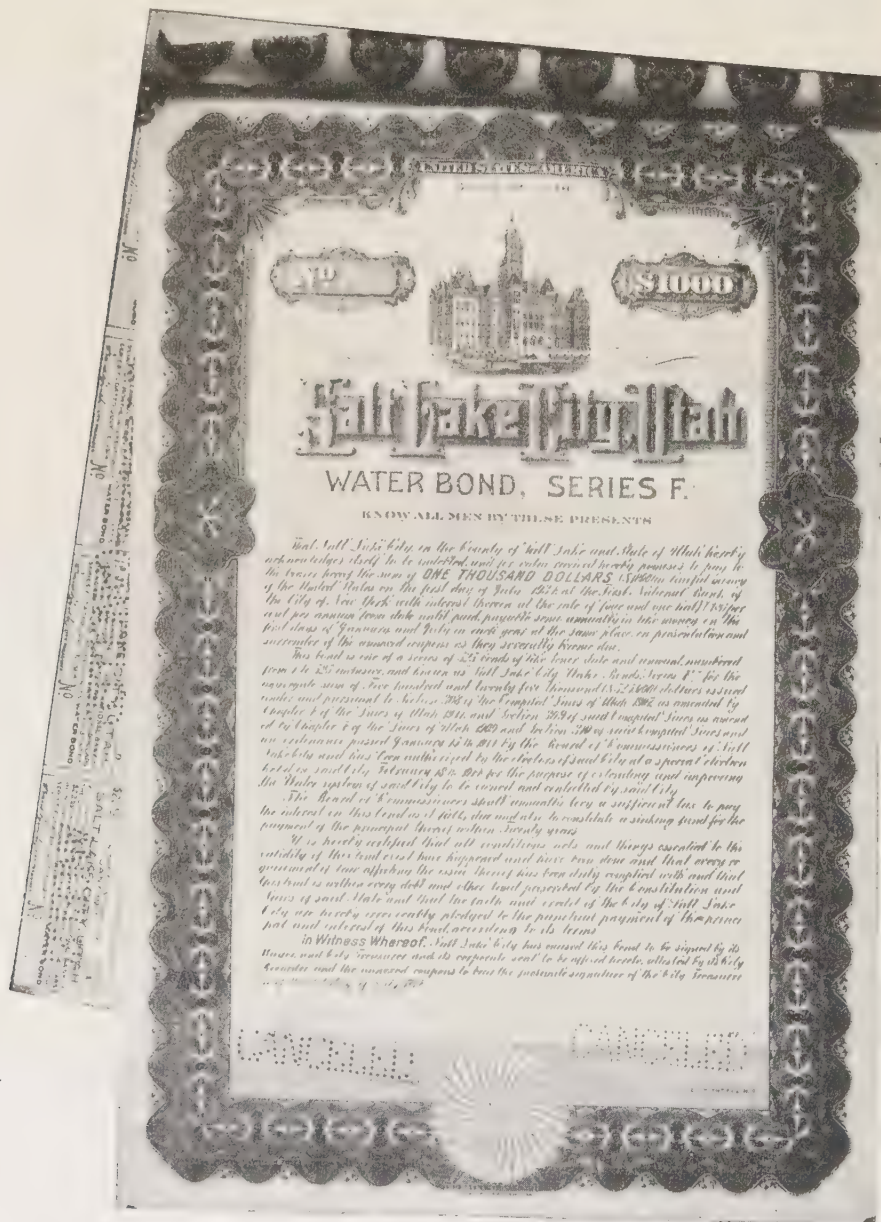
As a rule, coupon bonds do not have the names of the owners upon them, so that they pass from hand to hand by delivery. Each bond has small certificates attached representing the interest upon the bond for a certain period. There are as many of these certificates as there are interest-paying periods for the life of the bond.

These coupons are cut off as they become due, and are presented for payment at the designated place.

A bond may contain, in addition to the negotiable promise, many other conditions and stipulations. If the bond is issued by a corporation, it will ordinarily be secured by a deed of trust on the property of the corporation.

Bonds of the United States Government, commonly known as “Government” bonds, are considered as the highest grade investment obtainable. While bonds of this nature return a lower rate of interest than “industrial” bonds they are valued for the maximum of security afforded. They are marketable at any time in commercial centers. Railroad bonds and many industrial bonds are listed on the stock exchange where they are bought and sold daily.

The following is a typical form of a corporation bond, with coupons attached:



QUESTIONS

What is a promissory note? Give the Negotiable Instruments Law definition. By what other names are they frequently called? Name the original parties to a promissory note.

Specify four requisites to a negotiable promissory note. What is the meaning of the word **requisite**? In what respect does it differ from the word **essential**? From the word **necessity**?

Are all written promises to pay money promissory notes? Is an oral promise to pay money a good contract? Can it be enforced? Is a promissory note a contract? What does the maker obligate himself to do? Name the three ways he may be discharged from his liability.

What is a due bill? An I. O. U.? Are they negotiable? What is their legal importance? What is an "open account?" Why is a due bill preferable to an open account? In what several respects is a promissory note preferable to a due bill, or an open account?

Write in the shortest possible form a negotiable promissory note for \$10.00, due in thirty days from present date.

What is a joint and several note? What is the liability of the makers? From whom may the holder collect?

Be prepared to write on the blackboard a joint note; and a joint and several note.

What is a certificate of deposit? By whom issued? Is it negotiable?

What is a bond and by whom issued? Explain the difference between a registered and a coupon bond. What are some of the advantages and disadvantages of each?

CASE PROBLEMS

Case problem No. 67.—Are the following promissory notes valid? Give reasons for answer.

"Philadelphia, Penna., May 2, 1917.

Having been the cause of a money loss to my friend, Wm. Shakespere, I have given him three thousand dollars. I hold this amount in trust for him, and one year after date or thereafter, on demand, I promise to pay to the order of Wm. Shakespere, his heirs or assigns, three thousand dollars, with interest.

Charles Dickens."

\$100.00

"Los Angeles, Calif., Jan 10, 1917.

Thirty days after date I promise to pay John Jones, or order, services of the value of One Hundred Dollars, value received.

Richard Roe."

Case problem No. 68.—Is the following a promissory note or a due bill?

Oakland, California, December 1, 1917.

I have borrowed from D. D. Dunning twenty-five dollars (\$25.00).

Peter Sterling."

Case problem No. 69.—Roe gave a note to Miller which was made payable "on or before" a day named. Miller sues upon it as a negotiable note. Roe contends that it can not be a promissory note since it is not payable on a day certain. What is your opinion in the matter? (31 Mich. 421.)

Case problem No. 70.—"I promise to pay to the order of A. A. McLeod, Two Hundred Dollars." This instrument was properly dated and signed. Is it a promissory note? When is it due? What is the effect of the omission of "value received"? (61 N. Y. 73.)

CHAPTER XVII.

CHECKS.

§ 95. **Definition.**—A check is a written order payable on demand, drawn on a bank by a depositor, designating to whom he wishes the banker to pay the money. It is, therefore, an instrument by which a depositor seeks to withdraw funds from a bank.

A check is a bill of exchange drawn on a bank payable on demand. Except when otherwise provided, the Negotiable Instruments Law applicable to a bill of exchange payable on demand applies to a check. (N. I. L.)

No special form of check is necessary, but it is best to use the forms prepared by the bank. These forms are designed so that the following facts may be set forth: (1) the date, which includes the place, the month, day of the month, and year; (2) the number of the check; (3) the name of the bank or banking firm on which it is drawn; (4) the name of the person to whom the money is to be paid, called the payee; (5) the amount, which is written in figures in one location, and in writing in another; and (6) the signature of the drawer, which is the name of the depositor, or his name and the name of the person authorized to sign it.

Care in writing checks.—Great care must be exercised in writing checks. It has been held that: "If, by any act or negligence on the part of the drawer, as by so carelessly writing the check as to render it easily open to material alteration without leaving evident traces of such alteration, the customer has furnished the opportunity for the fraud which has deceived the bank, he must suffer the just consequences of his carelessness by bearing the loss himself." (Young v. Grote, 4 Bing. 253.)

The following is the common form of a bank check:

No. 218	EVANSVILLE, IND.	June 5-9	1915
CITY NATIONAL BANK			
PAY TO THE ORDER OF		F. J. Kline & Co	
Two Hundred Twenty-eight		DOLLARS	
\$228.00	Lowe & Blanton By W. H. L.		

§ 96. **When payable.**—A check is payable on presentation or demand; it is for immediate use. The implied contract between

the parties is that it shall be presented for payment within a reasonable time, that is, without delay; if the payee or holder retains the check and through negligence fails to present it for payment promptly, and the bank fails, the loss falls upon the holder and not upon the drawer or maker of the check, providing the drawer had money on deposit sufficient to pay it.

When the parties all reside in the same place, the holder should present the check not later than the following business day, and when payable at a different place from that in which it was received, the check should be forwarded on the same or the next succeeding secular day for presentment at the bank for payment.

§ 97. **Warranty.**—The drawer of a check warrants (1) that, he has sufficient funds on deposit to pay the check when presented; (2) that the bank will pay it on presentation; (3) and that if the bank does not pay it on proper presentation and notice to him of its dishonor, he will. If the drawer has no funds on deposit at the time of drawing the check on the bank, he is guilty of fraud to the holder of the check and also upon the bank.

The drawer of a check may stop or revoke its payment at any time before its presentation and demand for payment by giving notice to the bank upon which it is drawn. This is upon the theory that a check is simply an order given by the principal upon his agent, and that it is always open to the principal to countermand an order before it is executed. But the drawer of a certified check can not stop payment on it, and a notice to the bank does not release the bank from its liability thereon. The drawer's death also works a revocation of the authority of the bank to pay the check. If the bank should have paid it without knowledge of the death of the maker, the payment would be legal.

"Bad Check Law."—Many of the states have recently passed a statute commonly known as the "bad check law." The purpose of this law is to discourage the issuing of checks with insufficient funds in the bank to meet payment. This is especially so when a check is issued in bad faith.

Under the old law the burden was placed on the recipient of a bad check to prove the intent to defraud. Under the new law the maker of the check must show the absence of fraudulent intent. Thus:

"As against the maker thereof, the making of a check, payment of which is refused by the drawee, shall be *prima facie* evidence to defraud and of knowledge of insufficient funds with such bank, provided such maker shall not have paid the drawee thereof the amount due thereon, together with all costs and protest fees, within five days after receiving notice that such check has not been paid to the drawee." The maximum penalty being \$1,000.00 and one year in jail.

§ 98. **Certification.**—Where personal responsibility may be avoided by issuing worthless checks, business policy frequently demands what is technically known as a certified check. A person to whom a check is tendered may be in doubt as to whether the drawer has sufficient funds on deposit to pay it, or he may want assurance that the funds will not be withdrawn before it is

presented for payment. In dealing with the government, bidding on contracts, or meeting court obligations, a certified check is a necessity. A bank is under no legal obligations to certify a check; it does so merely as an accommodation for depositors.

§ 99. **How certified.**—No particular form of words is essential to the certification of a check. It is usually done by the bank writing or stamping across the face "good" or "certified" and the proper official signing it. The cashier is the proper person to perform this function, though it may be done by an authorized teller or the president.

If the holder obtains the certification, he thereby releases the drawer from further liability, the bank becoming the sole debtor. However, if the holder gets the drawer or maker to have the check certified, the drawer becomes a guarantor of the solvency of the bank, and that the bank will pay the check.

The following is a common form of a certified check:

SANTA CRUZ, CAL. June 19 1915 No. 2637

First National Bank
OF SANTA CRUZ

PAY TO THE ORDER OF Clark & Co. \$65.00

J. P. Ingram

19 DOLLARS

§ 99a. **Rights of holder against the bank.**—Until a bank accepts or certifies a check, it is in no way bound to the holder. This is true whether the maker has sufficient funds on deposit to pay it or not. In other words, a holder of a check has no right of action against a bank for refusal to pay a check not certified. This is a general rule, except in Illinois and possibly one or two other states. The bank may refuse without assigning a reason—it may be a mere whim. However, a bank has well-defined duties to perform for its depositors, and if a bank should decline to pay a check without assigning a justifiable reason for so doing, it would be liable to the depositor for any damages the depositor sustained in an injury to his credit through the failure of the bank to pay checks properly drawn.

But the bank's liability is to the depositor and not to the holder of the check. The rights of the holder are against the maker of the check and those who transferred it to him. It is

different if the check is certified. In such a case the bank is bound to pay it to a proper holder whenever presented.

Naturally, if there are no funds in the bank to the credit of the depositor, the bank need not honor the checks of the drawer. The rule is equally true when the funds are insufficient to pay the check in full. A bank is not obliged to make a part payment on the check to the amount of the funds on deposit. Likewise the bank may refuse to pay the check if the depositor owes the bank a debt past due, larger in amount than the sum on deposit.

§ 100. **Bank draft.**—A bank draft is a check drawn by one bank on some other bank. It is evidence that the bank drawing the draft has money on deposit with the bank on which it is drawn. Banks usually keep money deposited in other banks in large commercial centers. These banks are called *correspondents* or *correspondent banks*. Banks sell drafts to their customers, who make use of them in making remittances from one part of the country to another. The draft should always be made payable to the person getting it from the bank. It can then be indorsed to whomever it is desired to transfer it, and it will serve as a receipt if proof of payment is desired.

Following is a common form of a bank draft:

No. 1116 Cincinnati, O. May 10 1915

First National Bank

Pay to the order of James A. Walker \$ 43 ⁶⁶/₁₀₀

Forty-three and ⁶⁶/₁₀₀ Dollars

To National Park Bank,
New York. } C. A. Godfrey
Cashier

§ 101. **Letters of credit.**—A letter of credit is a request from one person to another to make advances to a third person on the credit of the one who gives the letter. Or, as Judge Story puts it in his book on Notes and Bills, "It is an open letter of request whereby one person, usually a banker, requests that some other person or persons advance money or give credit to a third person named therein, for a certain amount, and promises that he will repay the same to the person advancing the money."

Form of a Traveler's Letter of Credit.

Brown Brothers & Co.

CIRCULAR LETTER OF CREDIT.

N^o. B/13,683.*Gentlemen:*POUNDS
NOT NEGOTIABLENew York, August 21st 1905

We beg to introduce to you Mr. Robert Thompson or Mrs. Katharine Thompson - to whom you will please furnish such funds as they may require up to the aggregate amount of £1,200 - Twelve hundred pounds sterling against demand drafts on MESS^{RS} BROWN, SHIPLEY & Co. 123 FILL MALL, LONDON, each draft to be plainly marked as drawn under Brown Brothers & Co's Letter of Credit N^o. B/13,683. We engage that such drafts shall meet with due honor in London if negotiated on or before June 30th 1906 and request you to buy them at the rate at which you purchase demand drafts in London. The amount of each draft must be inscribed on the back of this letter and it is our wish to call your special attention to the fact that this letter itself should be cancelled and attached to the final draft drawn. Please see to it that the drafts be signed in your presence and carefully compare the signature with the one below. We are

£1,200-

*To Messieurs
The Bankers mentioned on the
third page of this Letter of Credit.*

Your obedient Servant

Brown Brothers
The signature of
Robert Thompson
Katharine Thompson

Letters of credit are generally for the use of persons traveling in this or other countries, that they may avoid carrying specie, and be enabled to obtain money wherever they may be.

A letter of credit is generally limited as to time or amount, but it may be unlimited as to either or both. It may also be a general letter of credit or a special letter of credit. It is general if addressed to no particular person. It is special if addressed to a particular person or corporation, and in such a case should be presented to such person or corporation.

A letter of credit is ordinarily drawn for the benefit of a particular person, and is not negotiable.

To buy a letter of credit is practically to buy a draft on London and which is to be paid in such sums on demand as may be desired. Foreign letters of credit are ordinarily issued in English pounds sterling, since they are recognized by bankers on account of the necessity of having London exchange.

With a letter of credit the holder may go to any of the banks named and ask for a portion of the sum designated. This money will be paid in the coin of the country at the prevailing rate of exchange. The holder identifies himself by writing his name and the signature must correspond with the one on the letter of credit.

Traveler's checks and letters of credit are now issued by the leading express companies. These checks are drawn for a definite amount when bought. Hotels will generally cash these traveler's checks. This makes them exceptionally convenient since letters of credit must be cashed by a bank.

QUESTIONS

What is a check? What particular form is necessary? What general details should be set forth on a check? Are you at liberty, if you so desire, to print your own blank checks? Why should checks be very carefully drawn?

Write a check on the City Bank and in your favor. A check is sometimes said to be a sight draft. State the points of resemblance and difference between a check and a sight draft. How would you write a check for fifty cents?

When is a check payable? A check has no date—does this make it void? Checks are sometimes post dated. Why? Would a check dated on Sunday be good? What is the implied contract between the maker of a check and the payee as to when it is to be presented for payment? What is a reasonable time?

Name the three warranties of a drawer of a check. Is the drawer of a check guilty of any offense, and if any, what, if he draws a check without having money on deposit? Upon what theory may the maker of a check stop its payment before it is presented? In what other way is the bank's authority to pay a check revoked?

How and by whom are checks certified? What is the object? Are banks legally required to certify checks? What is the liability of a bank to the holder of a check that is not certified? To one that is certified? When may a bank refuse to cash a check?

What is a bank draft? How does it differ from a check? To whom should it be made payable? Why? Why are bank drafts more acceptable than individual checks?

What is meant by a letter of credit? To whom issued? What are its advantages? How is the holder usually identified? Are letters of credit negotiable?

CASE PROBLEMS

Case problem No. 71.—Manley gave Baker his check upon a certain bank in the city in which they both resided. Five days thereafter the bank became insolvent. Baker had not yet presented the check for payment. Upon whom will the loss fall?

Case problem No. 72.—Brannon deposited \$1,000.00 with the City Center Bank. Soon thereafter he gave a check for \$200.00 to Lincoln, who, in due time presented it for payment. The bank, without assigning any reason, refused to pay it. What are Lincoln's rights (a) against the bank? (b) against the maker of the check? Does Brannon have an action for damages against the bank for refusing to pay the check?

Case problem No. 73.—Adams gives his check to Long, who indorses and delivers it to Rich. Rich transfers it to Davis. Davis has the bank to certify the check. Soon thereafter Davis presents it to the bank for payment, but the bank refuses to pay it on account of insufficient funds to the credit of Adams. What parties are liable on the check?

CHAPTER XVIII.

FORM AND INTERPRETATION.

§ 102. **Essential elements.**—An instrument to be negotiable must conform to the following requirements:

First. It must be in writing and signed by the maker or drawer.

The writing may be executed with pen and ink, lead pencil, typewriter or it may be printed.

There must be a signature in some form or other of the maker or drawer signed to the instrument. The maker or drawer may sign his name by means of a rubber stamp; he may substitute for his name a cipher, figures, or other characters, and he may "make his mark," although able to write. But a mark does not prove itself like a signature.

It is not necessary that the person unable to write his own name, in the execution of a note, touch the pen while another is signing for him. It is only necessary that such person be authorized to sign. (35 N. E. 925.)

When the signature is indicated by "mark," it is customary to have the mark identified by witnesses, but this is not necessary to the validity of the signature. (6 Allen 34.)

A description sufficient to identify the drawer or maker instead of the name will suffice, so a note signed "Steamboat Ben Lee and Owens" was held to be sufficiently executed. (21 Mo. 402.)

Ordinarily, the maker signs his name at the lower righthand corner, and this is the better practice, but it is not necessary that it be written there to be legal, as it may be written in the body of the instrument or even at the beginning of it. If it is not in the usual place, the responsibility of showing that it was the intention of the maker to be bound by the instrument will rest upon the holder, not the maker.

All commercial papers should be signed by the party responsible for payment, or by a lawful agent. An agent should have a power of attorney as evidence of his authority. (See § 204.) In the case of a corporation, the signature must be made by a legally authorized official; and those accepting commercial paper signed by a corporation must know that the person who signed it had authority to do so. When commercial paper is signed by a partnership or corporation, the firm name must appear first, and under this the name of the person authorized to sign.

No one should sign papers for another without writing his own name, preceded by the word "by" or "per" underneath the name signed. If he signs his name underneath that of the principal without using these words, he may then be held jointly liable with the principal or maker. The use of "per" or "by" shows that he is merely a scribe who writes for another.

Second. It must contain an unconditional promise or order to pay a sum certain in money.

"Due Currier and Baker, \$17.14" was held not to be a promissory note, but simply an admission or acknowledgment of an indebtedness. (40 Conn. 349.)

The order of an employee, drawn on his employer, directing that the payment be made out of the salary to become due the employee, is not an unconditional order. The salary may never become due. (10 Modern 294, 317.)

The written promise to pay "out of the proceeds" of the ore to be mined, stated in a note taken in payment of a mine, was held to be a contingent obli-

gation (a simple contract) and not an unconditional promise, since there might never be any proceeds. (4 N. Y. 159.)

To be negotiable the instrument must be payable in money and not in commodities. "We promise to pay A or order \$1,000 in cotton" was held to be a nonnegotiable note. (58 Ala. 451.)

The instrument may designate a particular kind of money, as gold eagles or silver dollars.

The kind of money must be current in the place of payment. Hence a promise to pay "One thousand Mexican silver dollars" was held to be a negotiable note, if payable in Mexico, although the instrument was drawn in the United States.

The amount payable is usually specified by writing the same out in words in the body of the instrument and putting the amount in figures in the upper left-hand corner. Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount. But if the amount is in figures only it will suffice. The words "Fife hundred" and "Four Hund" were held to mean five hundred and four hundred, respectively.

The sum payable is a sum certain, although it is to be paid:

- (1) With interest;
- (2) By stated installments;
- (3) With exchange;
- (4) With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

A negotiable instrument must not contain a promise or order to do any act in addition to the payment of money, but if it is otherwise negotiable, it may give the holder an election to require something to be done in lieu of payment of money.

Richard Roe promised to pay to the order of John Doe "Ten dollars or ten bushels of wheat at the holder's option." Doe may elect, when the note is due, which he will take in payment, and the note is therefore negotiable. The election is on the part of the payee, or his assigns, and not the maker.

Third. It must be payable on demand or at a fixed or determinable future time; that is, it must be certain as to the time of payment.

An instrument is payable on demand: (a) where it is expressed to be payable on demand, or at sight, or on presentation; or (b) in which no time of payment is expressed.

By a "fixed or determinable future time" is meant that the instrument must be payable: (a) at a fixed period after date or sight; or (b) on or before a fixed or determinable future time specified therein; or (c) on or before a fixed period after the occurrence of a specified event, which is certain to happen, though the time of the happening be uncertain.

An instrument payable on demand—that is, immediately—becomes past due after a reasonable time.

If payable at or within a certain time after one's death it is good. "Thirty days after death I promise to pay Cornelius Carnwright, or order, \$1,500, with interest," was held to be a negotiable note because the date was determinable. (127 N. Y. 92.)

A note payable at the maker's option, "on or before" a day named, or "within one year after date" is certain as to time and is negotiable. The maker may pay

sooner if he wishes, but this option if exercised, would be a payment in advance of the legal liability to pay and nothing more. (31 Mich. 421.)

"For value received, I promise to pay Oliver James Rice, or order, the sum of \$1,500 when he is twenty-one years of age, with interest from date. (Signed) Rachel G. Rice," was held to be nonnegotiable for the reason that Oliver might never attain his majority. A note payable upon a contingency is not negotiable even though the event does actually take place. (Rice v. Rice, N. Y. Supp. 97.)

Fourth. It must be payable to order or to bearer. The omission of this requirement will render the instrument non-negotiable, although it may conform to every other essential. It is considered payable to order when payable to the order of a specified person, or to him or to his order, thus, "Pay A or order" and "Pay to the order of A."

The payee must be named, or otherwise indicated therein, with reasonable certainty. This may be done without inserting the name of the payee, but his title may be given as "Pay to the City Treasurer of Chicago, Illinois."

The instrument is payable to bearer: (a) when it is expressed to be so payable; or (b) when it is payable to a person named therein or bearer; or (c) when the name of the payee does not purport to be the name of any person; (d) when the last or only indorsement is an indorsement in blank (that is, an indorsement of the indorsee only).

"Pay to A or bearer," "Pay to bearer" is negotiable, while "Pay to the bearer, A," is not.

A check payable to "Cash" or to "Bills Payable" is, in law, payable to bearer.

Fifth. Where the instrument (a bill of exchange) is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

"\$2,771.62.

Montevallo, June 1, 1858.

Ten months after date pay to the order of John S. Storrs, Two thousand seven hundred and seventy-one and 62/100 Dollars, Value received, and charge to the account of

To, Mobile, Ala.

D. E. Watrous."

In the foregoing the drawee is neither named nor indicated, and it was therefore held not to be a bill. (39 Texas 573.)

"Mobile, Ala., Nov. 16, 1867.

Steamer C. W. Dorrance and owners will please pay W. B. Seawell & Co. or order Twenty-two hundred dollars, and charge the same to the account of your, etc.

R. Swan."

In the last example it was held that the drawee was indicated, although not named, and it was therefore a bill. (35 Ala. 476.)

§ 104. Delivery.—A negotiable instrument is not effective until it is delivered. It must have passed out of the hands of the maker or drawer, and until it does so it is incomplete and may be erased, cancelled, or revoked. A note found among the maker's papers after his death would entail no obligation on his estate. But if a completed paper should be wrongfully taken from the possession of the signer and get into the hands of a purchaser for value, the maker would be held liable.

§ 105. Authority to fill blanks.—Where the maker of a nego-

511
370
10

tiabile instrument intrusts it to another with the blanks not filled, such an act carries with it implied authority to fill the blanks and perfect the instrument. This does not confer authority to make a new instrument by erasing what is written, or to fill the blanks with stipulations contrary to the express orders of the maker. However, such an instrument in the hands of an innocent holder will be enforceable.

The maker who carelessly leaves room for an alteration to be made without defacing the instrument will be liable upon it to a subsequent holder.

A blank note in the following form was delivered to Yale as a memorandum and not to be used as a note. Yale filled it as a note payable to his own order, and indorsed it to the plaintiff. The holder was held entitled to collect it. (2 Allen 236.)

"Brooklyn, Sept. 20, 1858.

\$1,585.90

	after date	promise to pay to the order of
December 23,		dollars at
		value received.
		(Signed) Geo. B. Ives."

§ 106. **Certain nonessentials.**—The absence or presence of the following conditions will not affect the validity and negotiable character of commercial paper:

(1) *Date.*—It is not necessary that a negotiable instrument be dated. But like all other contracts, it should be dated to avoid possible difficulties. In the absence of a date it is presumed to take effect from delivery. In most jurisdictions the holder may—if the place for the date be blank—fill up the blank with a date. It may be ante-dated or post-dated. If it is an impossible date (as April 31), the date of delivery usually governs, although it has been held that such date is April 30. It is immaterial whether an instrument is dated on Sunday or not, providing it was not in fact made and delivered on that day.

(2) *Place.*—The instrument need not specify the place where it was drawn or the place where it is payable, but the date should always be given. If it does not state the place of payment, it is payable at the residence or place of business of the maker, or wherever he may be found.

(3) *Value received.* The paper need not state the value given, or that any value had been given therefor. For the same reason the words "value received" or "for value received," so commonly inserted in some instruments, are in no way essential to their validity. They were at one time requisite to make a note negotiable, but it is now well settled that they express only what the law itself implies from the execution of the paper.

§ 107. **Consideration.**—Every negotiable instrument is deemed to have been issued for a valuable consideration. Between the original parties to it—that is, the maker and the payee of a note

or the drawer and payee of a bill of exchange—the instrument is like any simple contract, and the true consideration between the parties may be shown—that is, if A purchases a horse from B and B guarantees the horse to be sound, and A, as maker, gives B, as payee, his negotiable note for \$100.00 for the purchase price of the horse, and it develops that the horse is not sound, and B sues A upon the note—he can recover only the actual value of the horse; but if B negotiates the note to C, an innocent purchaser, for value before maturity, then C can sue A or B or both of them upon this note and recover the full amount thereof.

This again illustrates the difference between a negotiable instrument and a nonnegotiable instrument, because if the note, were nonnegotiable, C could obtain no greater rights against the maker thereof than the original holder had.

§ 108. **Days of grace.**—Prior to the adoption of the negotiable instruments law, a negotiable instrument payable at a future time was not deemed due and payable until the expiration of three additional days. These three days are termed “days of grace,” and were originally allowed at the election of the holder by way of favor to provide funds for the payment of the obligation. Days of grace have been generally abolished by statute in all of the states adopting the negotiable instrument law.

QUESTIONS

To be negotiable, an instrument must conform to what requirements?

May the writing be done with a lead pencil? On a typewriter? With a rubber stamp? Why are pen and ink preferable?

How may the maker, or drawer, sign his name? How is it customary to have a “mark” identified? Where should the instrument be ordinarily signed? Who should do the signing? If a document is signed by an agent, how should that fact be indicated? Would the signing by one person of another’s name in the presence of the latter and by his direction be sufficient?

What is the second essential of a negotiable instrument? How is the amount payable usually specified? May the instrument designate a particular kind of money? If the body of a check be drawn for \$210.00 and the figures are for \$200.00, which amount should be paid?

When is the sum payable said to be certain? Will the instrument be negotiable if it gives the holder the option to require some act in lieu of the payment of money? What must the instrument not contain?

What is the third requisite?

When is an instrument said to be payable on demand?

What words are required to make an instrument negotiable? When is an instrument said to be payable to bearer?

How must the drawee of a bill of exchange be indicated?

When does a negotiable instrument become effective?

What authority does the holder of a negotiable instrument have in regard to filling blank spaces?

Name the conditions that will not affect the validity of an otherwise negotiable document. A note has no date—does this make it void? A note is incorrectly dated as February 31—what is the effect?

If no place of payment is specified where is a note payable? What are the advantages of making a note payable at the maker's bank? What effect does the omission of the words "value received" have on a note? Are they ever placed on a check? Must there be a "consideration" for a commercial paper? What are "days of grace?" Why allowed? Are they abolished in your state?

CASE PROBLEMS

Case problem No. 74.—Brown works for a certain packing company, and is known among the employees as Number 211. He borrows a sum of money from a fellow workman and gives his note in payment, signing it "Number 211." Can Brown be held liable as the maker of this note?

Case problem No. 75.—"Montpelier, Vt., Nov. 17, 1914. Two years from date for value received I promise to pay J. S. King, or bearer, one ounce of gold. (Signed) A Prospector."

Is an ounce of gold money? Is this a negotiable note or a contract for the delivery of merchandise?

Case problem No. 76.—Adams gave Black his promissory note, whereby he agreed to pay Black, or order, one year after the death of his father, who was then living, \$500.00 out of any money he might receive from his father's estate. Was this a negotiable note?

Case problem No. 77.—Is the following a negotiable promissory note?

"Dallas, Texas, March 21, 1917.

On or before three months after date I promise to pay to John Smith the sum of \$25.00, with interest at the rate of 10% per annum from date until paid.
B. B. Bowers."

Case problem No. 78.—A merchant signed a number of blank checks and instructed his bookkeeper to fill them out with names of payees and amounts as needed in the business. The bookkeeper made the checks for large amounts and for purposes not authorized. The bank on which the checks were drawn cashed them. Can the merchant be charged by the bank for these checks?

negotiable by - 10 V 105716

CHAPTER XIX.

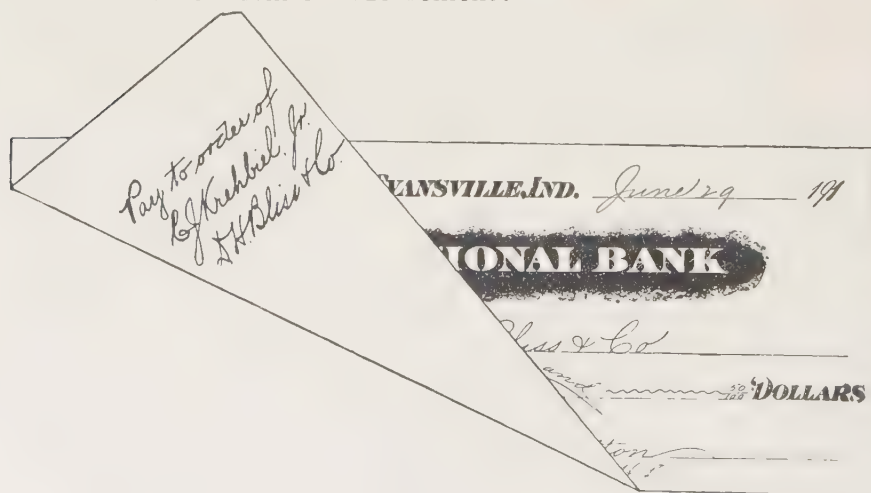
INDORSEMENTS.

§ 109. **Negotiation.**—An instrument is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by indorsement. Any owner may negotiate it.

Transfer by delivery.—A negotiable instrument payable to bearer is transferred by delivery without indorsement. A draft or note indorsed in blank is in legal effect the same as payable to bearer. The delivery may be voluntary, as where one hands it over to another; it may be involuntary, as in case it is lost or stolen. In both instances the title passes to the holder.

§ 110. **Indorsements.**—The usual mode of transferring the title to a negotiable instrument payable to order is by indorsement. It may also be indorsed for the purpose of strengthening the security of the holder. The word indorse is derived from two Latin words, *in* and *dorsum*, which means when combined, *on the back*. Therefore, the indorsement is usually written on the back of the instrument, but it is valid if written on the face. If by reason of rapid circulation the back becomes filled with indorsements, the same may be written on another piece of paper attached, and this is called an *allonge*. Unless the indorsement is dated, the negotiation is considered to have taken place before maturity.

Illustration of form of indorsement:



§ 111. **Forms of indorsements.**—An indorsement may be special, or it may be in blank; it may be qualified, conditional, or restrictive.

(1) *A special indorsement*, frequently referred to as an indorsement in full, is one which mentions the name of the person to whom or upon whose order the sum is to be paid. The person to whom it is thus transferred must indorse it before any succeeding holder can use it.

“Pay to R. Doe, or order. (Signed) Simon Smith.”

“Pay to the order of R. Doe. (Signed) Simon Smith.”
are examples of special or indorsements in full.

(2) *An indorsement in blank* consists in merely writing the name of the payee or holder on the back of the instrument without designating any transferee. (The indorsement is blank, that is, incomplete.) A subsequent holder may write over an indorsement in blank any contract consistent with the character of the indorsement. Thus, a blank indorsement may be converted into a special indorsement.

(3) *Qualified indorsement.*—A person who indorses a negotiable paper, whether in blank or by special indorsement, makes himself liable to the subsequent holder if the maker fails to pay the amount at maturity. Therefore, if a holder wishes to transfer the title without assuming such liability, he may do so by a qualified indorsement. This indorsement is made by writing “without recourse,” “or at the indorsee’s risk” over the signature of the indorser. The maker may be bankrupt and the holder be unable to collect anything from him, yet the indorser without recourse does not have to pay.

(4) *Conditional indorsement.*—If it is desired that the possession of the instrument is to pass to the indorsee, but that the title is not to pass until the happening of some condition, such a transfer is called a conditional indorsement. Thus, “Pay to R. Roe or order unless before payment I give notice to the contrary” is an illustration of a conditional indorsement.

(5) *Restrictive indorsement.*—By a restrictive indorsement the title is vested in the person named as a trustee for a certain purpose, as for collection or deposit.

A restrictive indorsement stops the negotiability of the instrument. The owner has, by making such an indorsement, given notice to the world that he owns it and that the holder holds it as the agent of the owner for the purpose to which it is restricted, but not to sell it.

Common examples of restrictive indorsements:

“Pay to R. Doe for collection, John Doe.”

“Pay to R. Roe only, John Hoe.”

“Pay to the order of Union Bank for Deposit, John Roe.”

“Pay to R. Roe for the account of S. Smith.”

Various Forms of Indorsements.

Special Indorsement

or

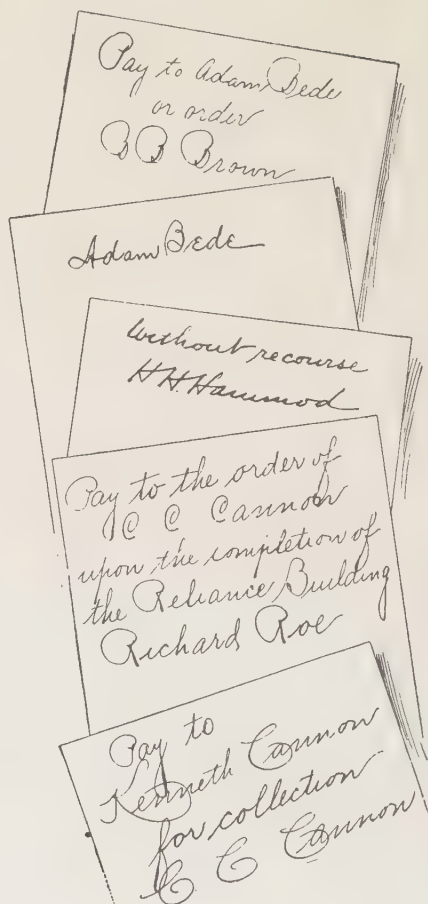
Indorsement in Full.

Indorsement in Blank.

Qualified Indorsement.

Conditional Indorsement.

Restrictive Indorsement.



§ 112. **Accommodation indorser.**—An accommodation indorser is one who indorses commercial paper for the purpose of lending his name to some other person as a means of obtaining credit. It is a gratuitous act on the part of the indorser for the benefit of the accommodated party, hence there is no liability on the part of the indorser to the accommodated party. As to subsequent holders, the accommodation indorser agrees that at the maturity he will pay it if the maker does not.

§ 113. **Indorser's warranties.**—Every transferer of negotiable paper, whether by delivery or by a qualified indorsement, warrants:

First. That the instrument is genuine and in all respects what it purports to be.

If the defendant should deliver to the plaintiff without indorsement a note made by Roe, payable to bearer and unknown to either the plaintiff or defendant, and it should develop that the note was forged, fictitious or altered, the plaintiff would have a right of action against the defendant on his implied warranty that it was genuine. The defendant would be liable even if the note were indorsed without recourse.

Second. That he has a good title to it.

If a note is stolen and the thief attempts to transfer it to an innocent purchaser by forging the payee's name, he does not thereby convey title. One can not transfer and give title to what he does not own.

Third. That all prior parties had capacity to contract.

If in the first illustration Roe were an infant, thus legally incapacitated from making a contract, the defendant would have been liable on his implied warranty that the prior parties had capacity to contract.

Fourth. That the instrument is at the time of indorsement valid.

The defendant would be liable on his warranty if the note were given in payment of a violation of some statute.

§ 113a. **Indorser's contract.**—An indorser of a negotiable instrument contracts with the present or future holder that if the maker does not pay it at maturity he, the indorser, will, if it is properly presented for payment and protested for nonpayment and notice thereof is sent to the indorser. Each indorser is liable in the order in which he indorses and is liable to all subsequent holders. The holder has the option of suing all or any one indorser.

Where the name of the payee or indorsee is wrongfully designated or misspelled, the holder may indorse the instrument as therein described, adding, if he think fit, his proper signature.

Where any holder is under obligations to indorse an instrument in a representative capacity, he may indorse in such terms as to negative personal liability.

QUESTIONS

What is the meaning of the word **negotiation**? When is an instrument said to be negotiated? Who may negotiate it? What are the two chief purposes of indorsement? How is a negotiable instrument payable to bearer transferred? When is delivery said to be voluntary? When involuntary? What is the usual mode of transferring title to a negotiable instrument payable to one's order? What is the literal meaning of the word **indorse**? Name the different forms of indorsement and the legal effect of each.

What is an accommodation indorser? What is the liability of such an indorser to the one accommodated? What to a subsequent holder?

When one sells a promissory note, what warranties are implied?

A check is made payable to Rosco Richardson as administrator. He desires to indorse the check and not be held personally liable. How can he do so?

Where is an indorsement presumed to have been made? Does an indorsee have the right to strike out a prior indorsement?

What is the liability of every indorser to future holders? Which indorser may the holder elect to hold liable?

CASE PROBLEMS

Case problem No. 79.—Marnell transfers a check to you by blank indorsement. It is then payable to bearer. How can you make it legally payable to your order?

Richardson, the payee of a negotiable note, indorses the same in blank and delivers it to Smith. May Smith convert this blank indorsement into a special one, and if so, how?

Case problem No. 80.—The cashier of the First National Bank, Omaha, Nebraska, mailed a draft to M. M. Owens, Springfield, Illinois, of which the following is a copy:

“First National Bank,

Omaha, Nebraska, February 27, 1917.

Pay to the order of M. M. Owens \$150.00 in current funds.

Robert Smith, Cashier.

To Bank of Springfield, Illinois.”

The letter was received at Springfield and was delivered by mistake to an M. M. Owen, who was not the proper payee. He wrongfully presented the draft for payment, and being a stranger called in Johnson to identify him. The local bank had Johnson indorse below Owen's signature and paid the money. Afterwards the rightful payee compelled the bank to pay him the amount of the draft. Thereupon the bank sued Johnson upon his indorsement. What is Johnson's liability?

Case problem No. 81.—You identify X— at your bank, by indorsement. The check which you indorsed for and which the bank cashed proves a forgery. Are you responsible and to what extent?

Case problem No. 82.—The holder of a note transferred it by writing on the back: “I transfer my right, title and interest in same. J. M. Burke.” The holder of the note brought suit against Burke as an indorser of the note. Burke contends he merely made an assignment and is not liable as an indorser. What is your opinion? (59 Okla. 219.)

Case problem No. 83.—Adams loaned Brown \$100 and took his promissory note. Six percent interest was agreed upon, but the space left for the rate was left blank. Adams, the holder wrote in the figure 8. What were Adams' rights? If Adams had transferred the note to Sterling in due course, for value and before maturity, what would have been Sterling's rights?

CHAPTER XX.

DEFENSES; PRESENTMENT.

§ 114. **Real and personal defenses.**—When a negotiable instrument is due, the “holder in due course” may enforce the payment of it against all persons liable upon it. On the other hand, certain defenses may be offered as an objection to its payment. The defenses that may be interposed may be against the instrument or they may be of a personal character. They are grouped into two classes: as (1) real defenses, and (2) personal defenses.

(a) *Real defenses* are those that attach to the instrument itself and are good against all persons; even a holder in due course is powerless against them. The following are real defenses:

First. Want of capacity to make a binding contract.

This includes the negotiable paper of infants, insane persons, and all others incompetent to make a contract.

Second. Illegality of contract.

If a contract is expressly made illegal by statute, it creates a real defense. Notes given in payment of wagers or gambling debts can not be enforced where they are made void by statute.

Third. Forgery or alteration. Forgery is a real defense, for the minds of the parties have not met in contract. If a material alteration has been made, without authority, in the instrument after it is signed, the innocent holder may recover from the person making the alteration and all persons indorsing after him upon the paper that is altered, and may recover from all prior parties upon the paper as it was in its original condition.

One can not be bound on an instrument to which his name has been forged or affixed without his authority. Where a person writes his name on a blank piece of paper and another writes a promissory note over the signature without authority, the note will not be enforceable against the person whose name is affixed thereto as maker.

Any alteration which changes the effect of the instrument in any respect is a material alteration. An alteration which changes,

- (a) The date;
- (b) The sum payable, either for principal or interest;
- (c) The time or place of payment;
- (d) The number or the relation of the parties; is a material alteration which may be set up as a defense against the payment of the instrument.

An action was brought on a note in which the maker was induced by a trick to sign, thinking it was an order for machinery. The instrument upon which the plaintiff sought to recover was the lefthand part of the following paper, the righthand portion having been cut off at the vertical dotted line:

BOALSBURG, PENNA., May 2, 1916.

Six months after date I promise to pay to J. H. Smith or order \$50.00 when I sell by order Two Hundred Fifty Dollars worth of Hay and Harvest Grinders for value received, with legal interest without appeal, and also without defalcation or stay of execution.

R A Davis

Agent for Hay & Harvest Grinders.

It was held there could be no recovery upon this instrument. There was no execution and delivery of a negotiable note. To make a real defense it must be shown that the party was free from negligence in order to escape liability. (79 Pa. St. 370.)

Fourth. Statute of limitations.

(b) *Personal defenses* are fraud, duress, want of consideration, payment, lack of title in the transferror.

§ 115. **Necessity of presentment.**—The holder of a negotiable instrument can hold it as long as he likes without losing his claim against the maker of a note or the acceptor of a bill of exchange, provided always that the time does not exceed the statute of limitations. The maker or acceptor promises directly to pay, and not merely to pay if another does not. Presentment is necessary to bind the drawer and indorsers; otherwise they will be discharged from liability. An indorser contracts that if the instrument is presented for payment at the time and place of maturity, and payment demanded and refused and proper notice given thereof, the indorser will pay the holder.

§ 116. **Day for presentment.**—Presentment must be made on the day the instrument falls due. Instruments falling due on Sunday or a holiday are to be presented for payment on the next succeeding business day. The presentment should be made at a reasonable hour, unless there are circumstances that would justify making it at a later hour.

If the instrument is payable January 31, presentment must be made on that day. An instrument dated January 31 payable one month after date must be presented on the last day of February.

Calendar months are meant when an instrument is payable so many months after date. A note for one month dated January 31 is due February 28 or 29, as the case may be. In computing time, if the time is given in days, the actual time is considered. Where days are expressed, Sundays and holidays are included. The day of date is excluded, but the whole of the last day is included. Hence, a note dated January 31, payable in thirty days, is due March 2 in ordinary years.

§ 117. **Place of presentment.**—A negotiable instrument may designate the place of payment either by expressly making it payable at a particular place, or by the maker or acceptor adding an address to his signature. When a place is specified, it must there be presented. If no place is specified and no address

is given, it must be presented at the usual place of business or residence of the person who is to make payment. If no such place can be found it may be wherever he can be found, or at his last known place of business or residence.

An instrument payable at the "Union National Bank" must be presented at the bank: at "114 South Main Street, St. Louis," must be at the place named. A presentment not made at the place specified for payment is of no legal effect. If it is payable at a bank and it has been deposited by the holders so as to be there on the date of maturity the presentment is complete.

Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make the payment has no funds there to meet it at any time during the day, in which case any hour before the bank closes on that day is sufficient.

§ 118. **Presentment, by whom.**—Presentment should be made by the holder, or by his lawful agent. Upon the death of the holder, it should be presented by the holder's administrator or executor. The instrument must be exhibited to the person from whom payment is demanded, and when paid, it must be delivered to the person paying it.

§ 119. **Presentment, to whom.**—Presentment of a note is made to the maker, and of a bill to the acceptor. In case of the death of such persons, it would be presented to their personal representative, if one has been appointed and qualified. When the instrument is made or accepted by two or more persons jointly, the demand should be made on both or all of them unless they are partners, when one is sufficient.

§ 120. **Protest.**—A protest is a formal declaration made in writing by a notary public (a public officer authorized to administer oaths, note protests, and to take acknowledgments of deeds and other instruments) on behalf of the holder of a bill of exchange or note, attesting that it has been presented for acceptance or payment and that it was refused. A protest under a notary's signature and seal is received everywhere as legally authenticated without other evidence; hence the notary must make the presentment and demand, that he may have the evidence of the dishonor. After presenting the paper, he notes thereon the fact that on that date payment was demanded and refused, writing across the face of the instrument:

"Protested by me for nonpayment (or nonacceptance) this 1st day of April, 1921.
John Jones, Notary Public."

Protest must be made in the case of foreign bills of exchange, but it may be made of any other negotiable instrument. It is now the custom of banks and many business houses to protest all negotiable instruments, unless protest is waived, or the amount involved is trifling.

§ 121. **Certificate of protest.**—When a protest has been made the notary prepares a certificate, under his hand and seal, to which must be attached the instrument protested or a copy of it, and which must also specify:

§ 122. **Notice of protest.**—After the certificate of protest is made, notice of it must be mailed to each of the indorsers. The notice must be sent not later than the day following the dishonor. No particular form of notice is required. It will be sufficient if it conveys information that will acquaint the party of the demand and nonpayment of the particular instrument.

The following is form of notice:

Notice of Protest

DAYTON, WASH., Sept. 15, 1915

To J. A. Whitney & Co.,

Tacoma, Wash.

TAKE NOTICE That a check for \$ 15.00
drawn by Stubblefield & Stewart
upon American National Bank
in favor of J. A. Whitney & Co.,
or order, dated September 11, 1915, payable
at _____

having been this day presented for payment and refused, was **PROTESTED** by me for non-payment.

At the request of the holder of said check
I hereby notify you that they will look to you for payment of the same, together with damages, interest and costs accruing thereon, you being payee
_____ thereof.

Respectfully,

C. P. Dunbar
Notary Public

When a negotiable instrument has been presented to the acceptor for payment and payment has been refused, notice should be given to the drawer and to each indorser. The drawer or indorser to whom such notice is not given is discharged from liability, unless he has previously waived notice.

§ 123. **By whom given.**—The holder of the paper is the proper person to give the notice, or it may be given by his agent or any person who may have to pay the debt. It may be presented by a notary public who is employed to give the notice and who is to present the instrument whenever it is intended to protest it.

§ 124. **How given.**—The notice may be written or oral. If written, it need not be signed, and it may be supplemented with an oral communication. It may be given personally or by delivering it through the mails. When the notice is properly addressed, stamped, and deposited in the mail, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

QUESTIONS

What defenses may be legally offered as objections to the payment of a negotiable instrument? Name the three **real defenses**. If a bank pays a check with a forged signature, who is liable? If the signature is genuine, but the indorsement forged, who is liable? What is a material alteration? Distinguish between forgery and a material alteration.

How long may the holder of a negotiable instrument hold it without losing his claim? What is the necessity for "presentment?" On what day and at what hour must presentment be made? What is the basis of computing time? What day is excluded and which day is included?

Where and to whom must the instrument be presented? By whom and to whom should the presentment be made? By failure to present who are relieved from liability?

What is the object of "protest?" What is a notary public? What notation does the notary make after the paper has been presented? What is the custom of banks and business houses in general in regard to protesting negotiable instruments?

What must the notary's certificate contain? When an instrument has been protested to whom should notice be given, and how?

Write a recapitulation of the chapters on negotiable instrument.

CASE PROBLEMS

Case problem No. 84.—A blind man signed a note which was misread to him as a receipt. He had no reason to doubt the genuineness of the paper he was signing. Would he be held liable for payment to anyone?

Case problem No. 85.—The proprietor of a drug store gave a written order to an advertising company for a piano, and other items. Attached to the order was the druggist's promissory note payable to the advertising company, or order, for \$400.00. The note and order were on the same sheet of paper, but were separated by a perforated line. The note was detached from the order and sold. The purchaser alleged he was an innocent purchaser for value and before maturity. Was this such a material alteration as to preclude the holder's claim as an innocent purchaser?

Case problem No. 86.—Plaintiff gave a check in payment of a gambling debt but the next morning, an hour before the opening time of the bank, he gave notice to the cashier of the bank not to pay the check. But an hour previously the holder of the check had presented it to the cashier for payment, who cashed the check. Upon whom will the loss fall? Why?

Case problem No. 87.—Smith made a negotiable promissory note payable to bearer. Before maturity B stole the note and immediately transferred it to Clark for value, who had no notice of its theft. Is Smith liable to Clark on the note?

Case problem No. 88.—A note payable four months after date at 139 Fifth Avenue, New York, was indorsed as follows: Stone & Kimball; George B. Williams; University Press.

The note was not paid at maturity, and was protested. The address of Williams was not on the note and the notary mailed a notice to Williams at New York, his last known address. Williams lived in Washington and failed to receive the notice. Was he properly notified? To what parties need notice not be sent?

Case problem No. 89.—"A gives a note to B. B sells it, and it passes through C, D and E's hands, all of whom indorse it; finally F presents it for payment; it is dishonored and he sends notice to E who sends notice to C and D. Will C and D be liable to anyone but E, and why?

Case problem No. 90.—

Chicago, Illinois, Aug. 11, 1916.

One day after date I promise to pay to the order of W. W. Williams Five Hundred Dollars (\$500.00) at the Reserve National Bank, Chicago, Ill., value received, with interest at the rate of 6 percent per annum until paid.

Robert Robinson,
J. J. Judy, Surety.

On the back of the above note are the following names in order:

H. H. Jones,
W. W. Williams, Surety.
For value received I hereby guarantee
the payment of the within note.
N. Sumner
Waiving protest,
Jas. Spring
Pay to the order of Gus August without recourse on me,
R. R. Ross
Gus August.

This note is in the hands of yourself as holder. What must you do in order to protect your legal rights, and whom may you sue?

What is the contract of each person whose name appears on the back of this paper, and what rights may he insist upon when defendant, and what duties must he show he has performed when plaintiff?

CHAPTER XXI.

GUARANTY AND SURETYSHIP.

He that is surety for a stranger shall smart for it: and he that hateth suretyship is sure. Proverbs xi, 15.

General Principles.

§ 125. **Definition.**—Guaranty or suretyship is a contract whereby one person engages to become responsible to another for the payment of some debt or the performance of some duty by a third person.

The words *guaranty* and *surety* are often used interchangeably, signifying the same thing. These terms are similar in many respects—the guarantor and surety are each bound for another person; they differ in that the surety is bound upon the original undertaking or contract while the guarantor's promise is a collateral agreement. In other words, the surety promises with another party to do an act; a guarantor promises that another will do it.

Collateral, as used in the foregoing, refers to that which is in addition to but not strictly a part of the main thing under consideration.

The words *warranty* and *guaranty* were originally synonymous terms, but they are now used in a somewhat different sense. *Warranty* expresses the responsibility of the person doing the act, *guaranty* the responsibility of some other person on his behalf.

§ 126. **Contract.**—Guaranty and suretyship are founded upon a contract, and all the essential elements necessary for the formation of a valid agreement must be present. The contract must be in writing. This is necessary in order to comply with the Statute of Frauds, which provides that the promise to answer for the debt, default, or miscarriage of another to be enforceable must be in writing and be signed by the party to be charged, or his authorized agent. No special form of words or phraseology is required, but any writing that will embody the terms of the agreement between the parties will be sufficient.

"I hereby guarantee the payment of the within note, without protest. Richard Roe," was held to be sufficient to constitute a contract of guaranty.

"For a consideration I hereby agree to become security for the faithful performance," etc., was held to be a contract of surety.

§ 127. **Parties.**—There are at least three persons to every contract of guaranty or suretyship. *First*, there is the one who gives the promise or guarantee, and who is called the *guarantor*

or *surety*; second, the person whose payment or performance is secured or guaranteed is termed the *principal debtor*, or simply the *principal*; and third, the person to whom it is given is the *creditor*. Any person competent to contract may become a guarantor or surety.

§ 128. **Consideration.**—Every contract of guaranty and of suretyship must have a consideration to support it—but the law will not inquire into its adequacy. The consideration may consist either of some right, interest, or benefit to the principal or guarantor, or some loss, detriment, or responsibility suffered by the creditor. It must not be a past consideration, and if it was executed before the contract was made it would not be sufficient to sustain the contract. If made at the time of inception of the obligation it will be sufficient.

"I hereby guarantee the payment of any goods which Richard Roe delivers to John Doe. (Signed) F. O. Greene." The delivery of the goods to John Doe is the consideration for the promise.

If the goods had been already sold and delivered to Doe, then in order to hold Greene responsible on his guaranty a new consideration would be necessary. Or, if Richard Roe should agree to extend the time of payment after the goods had been delivered on the strength of this promise there would be a consideration that would be binding.

§ 129. **Kinds of guaranties.**—Guaranties may be classified as either *general* or *special*. They are sometimes further distinguished as being *limited* or *continuing*.

A *general guaranty* is one that is not addressed to any particular person or firm, but is open for acceptance by the public generally. Anyone to whom it is presented may act upon and enforce it the same as though he had been specifically named. The following letter of credit is a general guaranty:

"As you request, we are willing to help you in the purchase of a stock of goods. We will, therefore, guarantee the payment of any bills which you may make under this letter of credit, not exceeding fifteen hundred dollars.

(Signed) John Doe."

A *special guaranty* is one addressed to a specific individual or firm. The privilege of accepting such a guaranty is confined to the person to whom addressed—and none other. The following is deemed to be a special guaranty:

Messrs. Bingham Brothers & Company,
Dayton, Ohio.

Gentlemen: Any draft that you may draw on Richard Roe of our city we guarantee to be paid at maturity.

(Signed) Boson, Burns & Co."

A limited guaranty is one confined to a single or a definite number of transactions, or is limited to a specified date.

A continuing guaranty embraces successive dealings not limited as to time, and remains as standing security until it is withdrawn, either by the act of the parties or by the death of the guarantor.

§ 130. **The guarantor.**—The guarantor is the person who gives the guaranty. It is he who is bound to the creditor upon a separate contract from that of his principal—and not in a joint undertaking to do the thing—he promises to answer only for the consequence of the default of the principal. Hence, the liability and responsibility of a guarantor is less than that of a surety.

§ 131. **Notice.**—The guarantor is not obliged to take notice of the nonperformance of the original contract of the principal. The creditor must give such notice. This is particularly true if there is a provision that the guarantor is to receive notice. A failure of the creditor to give notice may release the guarantor to the amount of damages he may sustain by reason of not having received the notice. Business courtesy demands that notice be given even though legal requirements may not.

§ 132. **Diligence.**—The creditor must also exercise diligence in an effort to collect payment from the principal. What is reasonable diligence will depend upon the circumstances of each particular transaction—it might require a jury to settle the question; there is no inflexible rule. The conditions of the guaranty must be strictly followed; the guarantor can be held only for the amount agreed upon; if there is a time limit mentioned it must be observed.

§ 133. **The surety.**—A person who contracts jointly with the debtor (the principal) is deemed a surety. He is bound with his principal as an original promisor, by the same instrument, executed at the same time, and on the same considerations. But one who enters into such a contract should write the word *surety* immediately after his name to indicate that he is not a co-maker.

The obligation of the surety to see that the debt is paid is absolute, and not conditional upon the failure or inability of the principal. He is obliged to do what the principal has contracted

to do—unless by the terms of the agreement his responsibility is limited. And the liability will continue indefinitely unless there is a fixed or implied time when it is to cease.

One may become bound as surety for another in a bond, bill, or note for the payment of money, the delivery of property, or in any other kind of a contract. The following is an example of a promissory note signed by a surety.

\$500.00.

Thirty days after date I promise to pay to the order of Richard Roe Five Hundred Dollars. Value received.

Boston, Mass., July 21, 1914.

to the order of Richard Roe Five
Peter Sterling.

Samuel S. Smith, Surety.

§ 134. **Notice.**—The creditor is not required to give the surety notice of the nonpayment of the debt. The latter is held to know of the default of his principal. Nor need the creditor display any diligence in an effort to collect from the debtor before proceeding against the surety, but he may proceed against him at once for the payment. Thus, it will be readily seen that the responsibility of a surety is much greater than that of a guarantor.

§ 135. **Rights of guarantor and surety.**—A person who becomes responsible as a guarantor for another under a contract of guaranty has certain rights against the principal, the person for whom the guarantee is given, and also against those who may be co-guarantors in respect to the same obligation. This right may be one of (a) indemnity, (b) subrogation, or (c) contribution.

(1) *Indemnity.*—Upon the maturity of the debt or obligation, the guarantor may pay it at once. He may do this to avoid costs and interest. If he has made such a payment, the guarantor may recover from the principal whatever he may have paid on account of the latter's default. This will include the payment of the debt and reasonable costs. Whenever a guarantor has paid any part of a guaranteed debt, he then becomes a creditor for the amount so paid and may compel repayment of the amount.

(2) *Subrogation.*—The moment a guarantor pays the debt of the principal, the creditor must transfer to the former any property or securities he may hold for the principal. The guarantor then stands in the place of the former creditor. This substitution of one person for another is called subrogation and gives to the substitute all the rights of the person for whom he is substituted.

Roe borrowed money of Brown. Roe gave Brown a mortgage on his stock of goods. Smith guaranteed the debt. When the mortgage fell due Smith paid the debt to Brown. Smith was then entitled to the mortgage Brown held as security against Roe. But Smith did not have this right until he had paid the debt for which he was also held liable.

(3) *Contribution*.—When two or more persons are jointly bound for the principal they are co-guarantors. If one of the guarantors pays the debt or obligation he may compel the other guarantor or guarantors to reimburse him for their *pro rata* share. This is called *contribution*.

Brown, Smith and Jones guaranteed Black's debt of \$300.00 to Edwards. Brown paid the entire debt when it was due. He was then entitled to \$100.00 from Smith and \$100.00 from Jones and may sue to recover it. But if he paid only his share (\$100.00), he could not recover from either Smith or Jones. If Brown compromised the debt with Edwards and settled for \$150.00, he could recover \$50.00 from each of the co-guarantors.

§ 136. **How extinguished**.—One of the minor differences between a guarantor and a surety is that in case of default the guarantor is usually entitled to a notice of the default, while the surety is not. Hence, with the exception of notice, any act that will discharge a guarantor from his liability will also release a surety from his obligation. This discharge may be accomplished in various ways, the most important of which are:

- (1) Payment of the debt;
- (2) Extension of time;
- (3) Alterations;
- (4) Fraud;
- (5) Loss or surrender of securities.

Payment.—The payment of the debt or the performance of the obligation by the principal will release the guarantor. Likewise, if the principal and his creditor effect a settlement and the latter accepts a less amount than the debt, but in full satisfaction of it, this compromise will also extinguish the liability of the guarantor, for whatever releases the principal obligation will determine that of the guarantor.

Extension of time.—An agreement between the principal and the creditor to extend the time of payment or performance releases the guarantor. But this extension must be made (a) for a consideration, (b) a definite time, and (c) without the consent of the guarantor.

A mere delay in enforcing collection or performance, or other leniency shown is not considered an extension of time. On the other hand, an agreement between the guarantor and the creditor for an extension of time to the former or even releasing him entirely does not discharge the principal from his liability.

The guarantor has a right when the debt is due to pay it and is entitled to the securities in the hands of the creditor. An extension of time, without the guarantor's consent, would deprive him of this right.

Richard Roe was surety on a note. On the day the note was due the holder endorsed upon it "Time extended six months, interest paid in advance." This was an extension of time and released Roe as surety for the payment.

Alterations.—If the principal and creditor materially alter the terms of the contract after its execution, it will have the effect of releasing the guarantor from his liability, unless, of course, he consents to the change. This alteration may consist in varying the terms of the contract, in taking new security from the principal in lieu of the original, in extending time of payment, or in the creditor's releasing the principal from his liability.

Smith gave Brown a note. Jones signed the note as surety. There was an agreement between Smith and Brown that the note was to bear interest, but it was not written in the note at the time Jones signed it. Interest was afterwards written in the note to conform to the agreement, but without the consent of Jones, and he was released from his liability.

Fraud.—If fraud is practiced by the creditor upon the guarantor, or if perpetrated by the principal with the knowledge and consent of the creditor, the guarantor will be discharged from his responsibility. If the principal is a defaulter, and that fact is known, but not disclosed, the concealment of the information is a fraud upon the guarantor.

Securities.—If securities belonging to the principal, placed with the creditor as additional protection for the payment of the debt are lost, on account of the negligence or want of diligence on the part of the creditor, the guarantor will be released to the extent of the injury sustained by the loss.

Likewise, if the creditor has securities or a lien on the property of the principal, he must not relinquish the lien or surrender the securities except upon the payment of the debt. To the extent that the creditor destroys the value of the lien or securities, to that extent will the liability of the guarantor be extinguished.

The payment of the debt by the guarantor entitles him to be subrogated to the securities deposited by the principal. It is, therefore, the duty of the creditor to protect the guarantor.

§ 137. **Surety companies.**—There are now corporations known as surety or bonding companies who furnish bonds for public officials and private individuals whom they consider desirable risks. These companies, for a consideration payable annually, called a premium, become security for the debt or obligation of the person bonded. The companies doing this kind of business require an application blank to be filled, giving the names of various references and other information relating to the record and history of the applicant.

QUESTIONS

Define Guaranty. Distinguish between guarantor and surety. What is the obligation of the surety? Of the guarantor?

What is the meaning of the word **collateral**?

What is the difference in meaning of **warranty** and **guaranty**?

The contract of guaranty must be in writing. Why? What must the writing embody?

How many parties are there in a contract of guaranty or suretyship? Who are they? State the legal relationship that exists between these different parties.

Designate the various kinds of guaranties. Give an illustration of each.

Must the creditor give notice? What will be the result of a failure to give notice?

What are the rights of the guarantor and surety?

How is a guarantor discharged? How is the surety discharged? What is the chief difference?

What are surety companies?

CASE PROBLEMS

Case problem No. 91.—Snyder wrote on the back of a note "I hereby guarantee the payment of the within written note, A. C. Snyder." Is this a guaranty?

Case problem No. 92.—Black executes a note in favor of Smith, and Richard Roe indorses the note. Would it make any difference whether Roe signed the note at the time it was made or later?

Case problem No. 93.—Hamlet said to a merchant: "Let Black have the goods he wishes to purchase, and if Black does not pay for them, I will." Acting on this promise the merchant furnished Black goods and charged them to Black. Black refused to pay the amount or any part of it. The merchant thereupon sued Hamlet for the amount of the bill. Can he recover? Give reasons for answer.

Case problem No. 94.—A father agreed verbally to become responsible for a suit of clothes delivered to his minor son by a merchant. Is this verbal promise binding upon the father?

Case problem No. 95.—Richard Roe is surety on John Doe's lease. Under the terms of the lease the tenant remains in possession for another year. Is the surety held for another year also?

Case problem No. 96.—A man borrowed \$600.00 and gave his promissory note with Lane, Blank, and King as sureties. When the note became due the payee brought suit against Lane, one of the sureties, and collected the whole debt from him. What rights and remedies does Lane have?

Case problem No. 97.—Adams was surety upon a note for Black. After the note became due, the maker of the note called at the bank where it was payable and procured an extension of payment for 30 days. How does the extension operate so as to affect the surety? Upon default at the expiration of the time, the bank brought suit against both Adams, the surety; and Black the maker. Can it recover against both of them?

CHAPTER XXII.

SALES OF PERSONAL PROPERTY.

Formation of the Contract.

§ 138. **Uniform Sales Act.**—A uniform statute on the principles of law as applied to the sales of personal property, prepared by a commission, for the purpose of codifying and bringing about a uniformity of laws in the United States, has been adopted by the legislatures in a number of states. It is more than likely that all of the states will enact this statute shortly. The subject will here be considered and treated briefly in accordance with many of the rules of the foregoing act, with such other explanations and illustrations as may be necessary.

Definition.—(1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

"A sale is a transmission of title to personal property for a sum of money." is in substance the brief but comprehensive definition of a leading authority on the subject.

The word *sale* is used in two senses: (a) It may mean a present transfer of the ownership of property (the title) in goods to the buyer for a price in money. It is often called an executed contract of sale, which is a completed sale. (b) It is also used to designate that the property in goods is to be transferred to another at some future time. This is a contract to sell and is said to be executory. A sale is executory as long as anything remains undone by either buyer or seller before the delivery of the commodity sold.

An executory contract of sale is not a sale at all but merely an agreement to sell. It transfers no interest in the property which is the subject of the sale, but it does give the buyer a right against the other party. It may be said that "a contract to sell is no more a sale than a contract to marry is a marriage." If, according to the terms of the agreement, the transfer of the property is to take place at a future date, it is a contract to sell; but if the transfer takes place at the time of the transaction, it is a sale.

These distinctions are for the purpose of determining upon whom the loss falls if the goods are destroyed or injured. In

the first instance the ownership passes to the buyer, although the possession may still be in the seller. If a loss occurs without fault of the seller it will be the buyer's loss. In the second instance there is a contract to sell and the ownership does not pass until the conditions of the agreement have been fulfilled. Hence, if a loss occurs, it will fall upon the seller.

The plaintiff bought a wagon from a farmer, paid the agreed price, and said he would call for it on the following day. Before the plaintiff called the wagon was destroyed by fire through no fault of the farmer. The loss was the plaintiff's. The ownership passed to him when the sale was made.

A merchant made an agreement with a farmer whereby the latter was to deliver at the merchant's place of business a wagonload of apples at an agreed price per bushel. The apples were destroyed by a frost before they were delivered, and the loss fell on the farmer. This was a contract to make a sale and the ownership of the apples would not pass to the merchant until they were delivered.

§ 139. **Necessary elements.**—To be a valid sale there must be present all the elementary principles of a contract, as:

First.—Parties competent to contract—the seller and buyer, legally called the vendor and vendee.

Second.—Agreement that the title to the thing is to be transferred to the buyer.

Third.—The subject-matter, the title to which is in the seller.

Fourth.—The consideration—payment or the agreement for the payment—of the price in money.

(1) *The parties.*—Capacity to buy and sell is regulated by the general laws concerning capacity to contract. Where necessities are sold and delivered to a minor or a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

(2) *Mutual assent.*—There must be a mutual assent to all the terms and conditions of the sale; there must be a "meeting of the minds," and without fraud, duress, or undue influence. What has been said concerning offer and acceptance equally applies to a sale of personal property.

(3) *Subject-matter of a sale.*—The goods which form the subject of a sale may be either existing goods, owned or possessed by the seller, or goods to be acquired or manufactured by the seller after making the contract to sell. Merchants and traders often make contracts for the sale of personal property for future delivery which is not theirs at the time.

It may be observed that while one can not, technically speaking, sell a thing to which he has no present title, he can make a valid agreement to do so.

A contract for the sale of a dead horse, which the parties at the time of the sale think is living, is no sale. The subject-matter is not in existence.

There can be no sale of a thing that does not have an actual or potential existence. Those "things which are the natural product or expected increase of something already belonging to



Photo from Painting by Harris & Ewing, Washington, D. C.

LORD BACON,
PHILOSOPHER AND LAW REFORMER.

FRANCIS BACON.

Francis Bacon, Baron Verulam, Viscount of St. Albans, born 1561 and died 1626. He was a celebrated English Philosopher and Statesman, and one of the most remarkable men of whom any age can boast. He was made solicitor general and then attorney general. In 1617 became Lord Keeper of the Seals, and in 1618 was made Lord High Chancellor. He was accused before the House of Lords of having received money for grants of offices and privileges under the seal of state, and, being unable to justify himself, he pleaded guilty and was sentenced to pay a fine of £40,000 and to be imprisoned in the Tower during the pleasure of the King.

Bacon wrote for the future. His *Essays* and *The Advancement of Learning* are read wherever the English language is known. He is said to have "moved the intellects which have moved the world."

the vendor" are said to have a potential existence. They may be the subject of a sale.

The wool from a flock of the seller's sheep, even before it grows; the future crop from his lands; or unearned wages from an existing contract may be the subject of a present sale. It must not be wool from sheep or a crop from land he intends to buy, or a contract for wages he may make. The property is vested in the buyer the moment it comes into existence, and a second buyer would not acquire title if an attempt were made to sell it to him.

The term *goods* includes personal property, as a wagon, a barrel of apples, a sewing machine, a patent or copyright, growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. Property means the ownership of the title of the goods and not merely a special property.

(4) *The consideration*, called the price.—The payment of a money consideration or price or an agreement, express or implied, therefore, is necessary to a sale of goods. There can be no sale without a price. It is this element that distinguishes a sale from a gift or a barter. In a gift a delivery is essential to pass the title, but this is not necessary in a sale. An exchange of commodities for either goods, labor, or the like, is called barter. The rules of law governing a sale are applicable to barter. A sale is distinguished from a bailment by the absence of an obligation to redeliver the subject-matter.

The price need not necessarily mean that payment must be made in money. It may be money or money's worth. If credit is not given it is understood to be a cash sale, and the payment and delivery are immediate and concurrent acts. Hence, the seller need not deliver without payment, and if the payment be not made at once there is no sale, but merely a bargaining. However, if the seller does accept the credit of the buyer, the thing sold immediately becomes the property of the buyer.

The price may be fixed by the contract, but this is not necessary, but when property is sold without fixing the price it is inferred that the buyer must pay a reasonable price. A reasonable price is a question of fact dependent on the circumstances of each particular case. Generally it is the market price.

Marks bought of Bowser & Co. in 1906 an oil tank for \$45.00. Two years later Marks ordered another tank, but said nothing about the price. The price had been advanced to \$55.00, at which price they had been regularly selling, but Marks did not know of this advance. The tank was shipped and a statement was mailed showing the price to be \$55.00. Marks refused to receive the goods and the plaintiff brought suit for the price. The buyer failing to name a price, implied he intended to pay the price it was reasonably worth—the current selling price at the time of purchasing. (32 L. R. A. 429.)

§ 140. *Required form*.—The contract may be made in writing (either with or without a seal), or by word of mouth, or partly in writing and partly by word of mouth, or it may be inferred

from the conduct of the parties. If the sale is affected by the statute of frauds, then it must comply with the provisions of that law so far as the writing is concerned.

§ 141. **Bill of sale.**—A formal written contract of sale whereby the seller transfers to the buyer specified goods, and usually includes a warranty of title, is called a *bill of sale*. It is valuable as evidence of what has been done. Such a document is particularly desirable when there has not been a physical delivery of the goods. A bill of sale transfers the title of the property. If for any reason the property is to remain in possession of the former owner, the bill of sale should be recorded. A bill of sale may be in the following form:

Bill of Sale.

KNOW ALL MEN BY THESE PRESENTS, *That I, Adam Bede, of the city of Pittsburgh, county of Allegheny, state of Pennsylvania, party of the first part, for and in consideration of the sum of Five Hundred Dollars (\$500.00) lawful money of the United States, to me in hand paid, at or before the ensealing and delivery of these presents, by John Quincy Adams, of the county and state aforesaid, party of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey unto the said party of the second part, his executors, administrators and assigns, one gray and one bay horse, weight about fourteen hundred pounds each; one new wagon, and two sets of harness*

To HAVE AND TO HOLD the said goods, chattels, and property unto the said party of the second part, his executors, administrators and assigns forever. And I do covenant to and with the said party of the second part that I am the true and lawful owner and have the right to sell and transfer the said goods, chattels, and property, and will defend the same against any person or persons whomsoever claiming the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the tenth day of March in the year one thousand nine hundred and twenty-one.

(Signed) ADAM BEDE [Seal]

*Signed, sealed and delivered
in the presence of
P. J. MORGAN.*

QUESTIONS

What is the first record in human history of the sale (a) of a chattel? (See Genesis 37: 26-28) (b) of real estate? (Genesis 23: 4-20) (c) give the dates.

What is a sale? How does a sale differ from a contract to sell? When does the ownership of goods pass from the seller to the buyer?

Bilikens writes to Simpson ordering mowing machines of a certain make and at a specified price, the same to be shipped thirty days from date. Simpson accepts the order. Is this a sale or a contract to sell? On whom will the loss, if any, fall in case the machines are destroyed?

Consult a dictionary for the meaning of (1) buyer, (2) seller; (3) vendor, (4) vendee; (5) purchaser, (6) price, (7) goods, (8) wares, (9) merchandise, (10) barter.

What are the elements necessary to constitute a valid sale? May one sell goods which he does not at the time have in his possession or own? What is the difference between goods having an actual and those having a potential existence? Give several examples of potential existence?

What distinguishes a sale from a gift and a barter? What is a bailment? How is a sale distinguished from a bailment?

How is the price determined? What is price?

May the owner of goods dictate the price at which he will sell them? If the price is not expressly stated how may it be determined? Would a sale at a price to be determined by the market price at a future date be a valid contract?

What is a bill of sale? What is its particular value? When is it particularly desirable to have such a document? Write a bill of sale in which you sell to your teacher a Ford Automobile.

CASE PROBLEM

Case problem No. 98.—On April 17, 1869, John Low & Son, being about to sail on a fishing expedition, received from Alfred Low & Co. \$15,000, and gave back a writing by which they agreed to "sell, assign, and set over" to Alfred Low & Co. all the halibut that might be caught on the voyage, the same to be delivered as soon as the vessel arrived at the port of Gloucester. Is the sale of halibut afterwards to be caught valid, so as to pass to the purchaser the property in them when caught? (108 Mass. 347.)

Case problem No. 99.—Moore agreed to accept and pay Thomas for a cow the latter was to deliver. The price was not agreed upon at the time, but was to be determined at a later date. Is this a valid sale? What would your answer be if the price was fixed by a third party?

Case problem No. 100.—An uncle promised his nephew a gold watch on his 21st birthday, but refused to keep his promise. Has the nephew any rights to the watch or a claim for damages against his uncle? What would your answer be if the uncle had promised to sell the watch to his nephew for ten dollars? If the uncle had given the watch as promised in the first instance would the nephew's ownership be as good as if he had bought the watch and paid for it?

Case problem No. 101.—Wilson bought and paid for a number of grape roots. When the roots were delivered they were found to be dead and of no value. Wilson sent them back and demanded the return of his money. Is the buyer entitled to recover and on what grounds? (61 N. Y. 614.)

CHAPTER XXIII.

STATUTE OF FRAUDS AS APPLIED TO SALES.

§ 142. **Contracts of sale which must be in writing.**—The seventeenth section of the English statute of frauds relates to the sale of personal property. It is substantially as follows:

No contract for the sale of goods, wares, and merchandise¹ for the price of ten pounds (\$50.00) or upwards shall be allowed to be good, unless (a) the buyer shall accept part of the goods so sold and actually receive the same; or (b) give something in earnest to bind the bargain, or in part payment; or (c) that some note or memorandum in writing be made of the bargain and be signed by the parties to be charged by such contract, or their authorized agents.

The foregoing statute has not been so generally adopted by the American states as the fourth section, previously considered. (See § 45.) In a few of the states no statute corresponding to this section exists, while in a number of others the limit of price or value varies considerably; fifty dollars is the most common amount. For essential changes see following table:

Not in force, Alabama, Delaware, Illinois, Kansas, Kentucky, Louisiana, North Carolina, Pennsylvania, Tennessee, Texas, Virginia, West Virginia.

Any value, Florida, Iowa, New Mexico.

Minimum, \$30.00, Arkansas, Maine, Missouri.

Minimum, \$33.00, New Hampshire.

Minimum, \$40.00, Vermont.

Minimum, \$50.00, Alaska, Colorado, District of Columbia, Georgia, Indiana, Maryland, Minnesota, Mississippi, Nebraska, Nevada, New York, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Washington, Wisconsin, Wyoming.

Minimum, \$100.00, Connecticut, Michigan.

Minimum, \$200.00, California, Idaho, Montana, Utah.

Minimum, \$500.00, Arizona, Massachusetts, New Jersey, Rhode Island.

Minimum, \$2,500.00, Ohio.

Choice of three methods.—Under the fourth section previously considered (see § 45) it was specifically stated that all contracts therein mentioned must be evidenced in writing to be enforceable. The present section, the seventeenth, offers a choice of three options, any one of which will satisfy the statute and render the sale enforceable. Thus:

(1) If the seller delivers and the buyer actually receives and accepts the goods or some part of them; or,

(2) If the buyer gives something in earnest or in part payment. Earnest money and part payment are considered the same thing. The payment may be

¹ Goods, wares, and merchandise.—A phrase used in the statute of frauds, covering generally, all classes of personal property.

in money or anything of value that may be used to reduce the debt of the buyer; or

(3) A written note or memorandum of the contract and signed by the party against whom the suit is brought, or by his agent.

This statute does not mean that contracts that fail to comply with its provisions are void; they are merely voidable.

§ 143. **Sales and contracts for work and labor.**—There is, sometimes, difficulty in determining whether a given contract concerning personal property is a sale or whether it is for work and labor. This is especially true where the thing does not exist in specie at the time, but is to be manufactured. If it is a contract for a sale, it is within the statute; if it is for work and labor, it need not comply with the statute to be enforceable.

Three distinct rules exist in this country. They are known as the *English*, the *Massachusetts*, and the *New York* rules.

It will be seen in the following illustrations that the English rule looks to the time of the performance of the contract. The Massachusetts rule looks to the nature of the contract. The New York rule looks to the time of the formation of the contract.

(a) *English rule.*—This rule as settled in a leading case is that "if the contract be such that, when carried out, it would result in the sale of a chattel, the party can not sue for work and labor, but if the result of the contract is that the one party has done work and labor which ends in nothing that can become the subject of a sale, the party can not sue for goods sold and delivered." Missouri, and probably one or two other states are the only ones that follow this rule.

Mrs. Pearson ordered two sets of teeth from Lee, a dentist, for which she was to pay \$105.00, but she died before the teeth were delivered. The dentist brought suit against Mrs. Pearson's executor for the amount due. The executor set up the defense that it was a contract for the sale of goods, wares, and merchandise, and the contract should have been in writing. The dentist contended it was for work, labor, and materials for which he was suing. The decision was in favor of the executor. (1 Best & Smith 272.)

(b) *Massachusetts rule.*—Under this rule a contract for the sale of articles (1) existing at the time of the agreement, or (2) such as the seller in the ordinary course of his business manufactures for the general market, whether on hand at the time or not, is one of sale, and the statute applies. But (3) if made by the seller especially for the buyer upon a special order and not for the general market, the contract is for work and labor, and is not within the statute.

Defendant gave the plaintiff a verbal order to make for him, according to specific directions, a carriage to cost \$675.00. It was to be marked with the defendant's monogram and had other special furnishings. After the carriage was finished, the defendant was notified and was presented several times with a bill for the cost. In the meantime the shop burned and the carriage was destroyed; the plaintiff sought to recover the amount due. It was held that the contract was not within the statute, but was for work and labor. The carriage was not in existence at the time of the contract; it was made especially for the

buyer, and was not such as the seller manufactured in the ordinary course of his business for the general market. (115 Mass. 450.)

This rule is adhered to in California, Connecticut, Georgia, Indiana, Maine, Michigan, Minnesota, New Hampshire, New Jersey, Washington, Wisconsin, Wyoming, and has been termed the American rule.

(c) *New York rule*.—Under the New York rule the article to be sold must be in existence at the time the contract is made that it may be a sale; although something is to be done upon it before delivery it is still a sale. But if the article is not in existence, the contract is not covered by the statute and the agreement would be for work and labor. According to this rule, the agreement of a dentist to make a set of teeth or a manufacturer to make a carriage would not be within the statute and an oral contract would be enforceable.

The New York rule is followed in Iowa, Maryland, South Carolina, and Oregon.

§ 144. **Receipt and acceptance**.—To satisfy the requirements of the statute there must be a receipt and acceptance of the goods. Both are necessary. A receipt without an acceptance, or an acceptance without a receipt will not answer. Goods may be received for the purpose of making an examination and afterwards be rejected. *Acceptance* is the assent of the buyer to become the owner. *Receipt* is taking possession of the goods. There can be no receipt so long as the seller retains or has a lien on them. A delivery of part of the goods sold and an acceptance of them by the buyer will comply with the necessary requirements. If there is no agreement as to the time for payment and delivery, they are both to be done at the same time.

§ 145. **Earnest or part payment**.—If the buyer “gives something in earnest to bind the bargain or in part payment,” the statute will be satisfied. These terms are regarded as synonymous. To be a part payment, something of value must be actually paid and accepted. A mere promise will not suffice. Generally, the payment may be made at any time. In New York and a few other states the payment must be made at the time of the making of the contract. When a part payment is made, this will make a receipt and acceptance unnecessary.

§ 146. **Note or memorandum**.—No prescribed form is required. The memorandum should contain in substance the material facts; the names of both parties; the subject-matter, identifying the property to be sold; the price actually agreed upon; if on credit, the time and manner of payment. It must be signed by the party to be charged, or by his authorized agent. The cor-

rect way is for it to be signed by both parties, since it may be uncertain which may seek to avoid the performance. An auctioneer is the authorized agent of both parties for the purpose of signing the memorandum.

QUESTIONS

What is the seventeenth section of the English Statute of Frauds? Has this section been reenacted in your state? With what material alteration? What are the main provisions of this law so as to make a sale binding?

What is the meaning of goods, wares, and merchandise?

What is the test between the English, the Massachusetts, and the New York rules in determining whether the contract is a sale within the statute or whether it is for work and labor?

Is the making of a suit of clothes by a merchant tailor within the Statute of Frauds?

Explain fully what is meant by receipt and acceptance in order to comply with the provisions of the Statute of Frauds.

Is taking possession of goods an actual receipt of the same? What constitutes an acceptance? Does a receipt of part, no matter how trivial, satisfy the statute? What is "earnest money?" Is it synonymous with part payment?

Enumerate the various requirements of the note or memorandum. By whom should it be signed? If the sale is at auction how and by whom signed?

CASE PROBLEMS

Case problem No. 102.—Defendant contracted to furnish a monument of a peculiar design for erection on a battlefield. Would this be a sale of goods or a contract for work and labor?

Case problem No. 103.—Robinson, a cigar dealer, called up on the telephone Livermore, a cigar manufacturer, and requested the latter to ship him at once ten thousand cigars of a particular brand and style known as Excelo. Livermore reported that while those cigars were a stock brand of his he did not have any on hand at the time, but would make them and ship them in ten days, if that would be satisfactory, the price to be \$300.00. Robinson agreed to the proposition, and Livermore made and shipped the cigars as agreed upon; but Robinson refused to accept them, and when sued, contended that he was not liable since the contract was not in writing. Would this be a good defense in your state?

Case problem No. 104.—Plaintiff entered into an agreement to sell defendant a number of hogs at an agreed price. Each of the parties placed a sum of money in the hands of a third party as a forfeit guaranteeing performance of the contract. The defendant refused to buy the hogs and the plaintiff brought suit for damages. Is the money deposited as a forfeit considered part payment? Is the contract enforceable? (60 Mo. App. 635.)

CHAPTER XXIV.

TRANSFER OF TITLE.

§ 147 **When title passes.**—It is important to know when the title or ownership to personal property, the subject of the sale, passes to the buyer, in order to determine upon whom the loss falls if the property is lost, stolen, or destroyed. The risk of loss goes with the title. Ownership does not depend upon possession. If the title has passed to the buyer, the seller may sue for the nonpayment of money; if it has not passed, the seller would sue for damages for a breach of contract.

Intention of the parties.—It is a general rule that the title passes when it is the intention of the parties to the bargain that it shall pass. These intentions may be ascertained by having regard to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case. Ordinarily, it will be presumed that the title and ownership will become invested in the buyer at the time the contract is made.

Fisk owned some valuable law books which he offered to sell to Meyers. Meyers was willing to buy. Accordingly he was given possession, although no price had been agreed upon between them. While Meyers had the books and before the price was agreed upon they were seized by an officer on a writ of attachment to settle a claim in favor of Callaghan against Fisk. Meyers brought suit against Callaghan for damages, contending the books were his. Callaghan insisted that title to the books could not pass until a price had been agreed upon, and that they therefore still belonged to Fisk.

It was held that: An agreement to sell, with delivery, may complete the sale, and vest the title although no definite price be fixed at the time of the sale. Whether the sale is executed and the title passes to the buyer depends upon the intention of the parties. It was decided that title had passed, and judgment was given for Meyers. (89 Ill. 566.)

§ 148. **Title of the buyer.**—A purchaser does not acquire a better or greater title in goods than the seller had in them. In other words, a person can not sell something he does not own. If goods are bought from a thief, or a finder, or one who had no authority to sell, the buyer obtains no right of ownership against the true owner. He simply gets whatever rights the seller had, and no more. The owner may take his property wherever he finds it. The buyer must look to the seller personally for damages. This is true although the goods were bought in good faith and full value was paid for them.

§ 149. **Negotiable paper.**—The rule above stated does not apply to negotiable paper; it is an exception. If the negotiable paper is transferrable by delivery, the purchaser who buys it be-

fore due and in good faith acquires a title thereto, although it may have been bought from a thief, or one who had no right to sell it. Furthermore, if the owner of goods or chattels should be induced by fraud to part with them and a third party bought the property from the defrauder, the owner could not reclaim them from the one who bought them in good faith.

§ 150. **How ascertained.**—Unless a different intention appears, the following rules are applied for the purpose of ascertaining the time at which the title in the property is to pass to the buyer.

(1) Where there is an unconditional contract to sell specified goods, in a deliverable state, the title in the goods passes to the buyer when the contract is made. It is immaterial whether the payment, or delivery, or both be postponed to some future time.

There was an agreement signed January 4 by Mr. Baxter and Mr. Farling to sell and buy a stack of hay standing in Mr. Baxter's field, at a certain price, payment was to be made February 4, but the hay was to be allowed to remain where it was until May 11. The hay was wholly destroyed by fire January 20 without any fault or neglect of either party. This was held to be an immediate, not a prospective sale, and the property rested in the buyer and the loss by fire fell upon him. (4 B. & C. 360.)

(2) If the seller is bound to do something to the goods for the purpose of putting them into a deliverable shape (as to paint a carriage), the title in the goods does not pass until such things are done.

Two farmers entered a store at the same time. One of them selected a barrel of flour, had it rolled to the door, where he was to get it later in the day. The second farmer said he would take a barrel of the same flour and would call for it on his way home. In the meantime a fire destroyed the store and flour. The title to the first barrel of flour had passed to the first farmer and the loss was his, although he had paid no money and had no receipt for the goods. The loss for the second barrel fell on the merchant. The title had not passed in the last instance. Why?

(3) When the goods are delivered to the buyer on approval or on trial or on satisfaction, they must be approved or tried before the title passes. If the buyer does not signify his approval or acceptance, but retains the goods without giving notice of rejection, at the end of a reasonable time (if no time has been fixed) the buyer will be regarded as having approved them and the title in the goods will pass to him.

(4) If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or transportation charges, the title does not pass until the goods have been delivered or reached the place agreed upon.

(5) *Conditional sales.*—A sale of goods with the express agreement that the title to the property is reserved by the seller until some condition is performed, such condition usually being the payment of the purchase price, is defined as a *conditional sale*. The right to the property under this law remains in the seller,

notwithstanding the goods may have been delivered. Upon a default in payment, the seller has the right to retake the property. When retaken, the whole indebtedness of the buyer is thereby discharged.

This class of sales has become quite common, especially the sale of furniture, machines, and sets of books sold on the monthly installment plan. It also serves a useful purpose in enabling persons with small credit to buy expensive machinery and develop small industries. The goods are sold under a special contract by which they are delivered with the first payment, the parties agreeing that the right of ownership is to be retained in the seller until the entire purchase price is paid.

In a majority of the states statutes have been enacted which require that these conditional sale contracts be recorded or filed in the office of the proper official, otherwise a sale of the property to an innocent purchaser would convey good title and the seller would lose his rights.

In some of the states it is also the law that the buyer may recover the partial payments made if he has defaulted in making a full payment and the seller retakes the goods sold. In the absence of such statutory regulations the buyer can not recover the partial payments made. To permit this to be done would be offering a bounty for the violation of a contract.

A merchant sold household furniture to a buyer upon the condition that the title was to remain in the merchant until the last payment was made. The furniture was delivered to the buyer, who subsequently moved, with the knowledge of the merchant, to another country, taking the furniture along. The buyer then sold the furniture to the proprietor of a hotel upon a conditional contract, which was duly recorded. The first sale was not recorded. The merchant by his negligence lost the title to the furniture, which now reposed in the hotel proprietor. The failure to register the contract rendered the instrument void as against a subsequent purchaser for value.

(6) Where there is a contract for the sale of a portion of goods in a mass or bulk, the title in the property will not pass until the goods, which are to constitute the subject of the sale, are separated or selected from the stock and identified as the subject of the sale for transfer. If goods are to be manufactured, the title will not pass until they are manufactured and tendered.

To the foregoing rule there is an important exception. It is held by the courts in many of the states that when there is a sale of but a part of a mass in which every particle is exactly like every other particle, it may be agreed that the title to the portion sold shall pass from the seller to the buyer before it is separated from the mass. This will apply to the sale of a certain number of gallons of oil out of a tank, a certain number of bushels of grain out of a bin or elevator, a certain number of tons of coal out of a heap of coal of the same kind, size, and grade.

While this is the law in many states, the better practice would be actually to measure out the quantity sold, set it apart by itself, distinctly labeled, ready for delivery.

§ 151. **Risk of loss.**—The goods remain at the seller's risk until the title to them is transferred to the buyer, unless it is otherwise agreed. When the title has been transferred to the buyer the goods are at his risk, whether they have been actually delivered or not.

Where the goods have been delivered to the buyer in accordance with a contract of conditional sale that the title is to remain in the seller as security for the payment, the goods are

at the buyer's risk as soon as they are delivered. If after they are delivered they should be lost or destroyed, while in the buyer's possession, but without his fault and before the purchase price is due, the seller can collect the full amount due upon the principle that the seller has done what he was bound to do when he delivered the goods, except to receive the payment.

§ 152. **Auction sales.**—(1) Where goods are put up for sale by auction, a sale is complete when the auctioneer announces the completion by the fall of the hammer, or in any other customary manner. Until such announcement is made, any bidder may retract his bid, and the auctioneer may withdraw the goods from sale, unless the auction has been announced to be without reserve. (2) The seller may reserve the right to bid. (3) If the seller has not reserved the right to bid by giving notice, it is not lawful for him to bid for himself or employ other persons to bid on his behalf. A sale contravening this rule may be treated as fraudulent by the buyer.

Plaintiff bid in and bought a tract of land sold by an administrator at public auction under an order of court. The purchaser filed exceptions to the report of the administrator contending that he bid the sum reported by him by reason of the connivance of the administrator in having "puffers and bi-bidders."

The court held that good faith is an indispensable element of fair dealing, and that it is impossible to imagine a purpose consistent with it, for which sham bidding is necessarily employed. The vendor may prescribe conditions of sale which will enable him to retain the property should it not come up to his price, but he must do so openly and not covertly. The sale was therefore fraudulent and void. (14 Pa. St. 446.)

§ 153. **Bulk sales act.**—Laws regulating the sales of stocks in bulk have been passed and are in force in all the states. The purpose of such statutes is to prevent the defrauding of creditors by the secret selling of all of a merchant's stock of goods in bulk for cash, pocketing the proceeds, and refusing to pay his debts, or leaving for parts unknown. The law provides that such sales are not good unless the creditors have had sufficient notice to file claims protecting their interests. In some states such sales are absolutely void, and the merchant is guilty of committing a felony.

"The legislature may, under the police power, pass such laws as it deems necessary for the suppression of fraud. The reasonableness of the act and the necessity for its enactment are legislative questions. Statutes of the same general character have frequently been before the courts of the different states and they have been sustained by the decided weight of authority." (263 Ill. 363.)

QUESTIONS

Why is it important to know when the title to personal property passes to the buyer from the seller? What is the general rule as to when title passes? Ordinarily when is it presumed to pass?

What sort of a title does the buyer get from the seller? If the buyer gets a defective title, to whom must he look for damages? State the exception wherein a buyer may get a better title in some instances than the seller had.

What is the first rule for ascertaining when the title in goods passes to the buyer?

If there yet remains something to be done to the thing sold, when does the title pass?

What is the rule when the goods are delivered to the buyer on approval? or on trial? or on satisfaction?

What is a conditional sale? In whom does the title exist? What rights does the seller have if the goods are unpaid? What is the statutory provision of this law in your state?

When does the title to goods that are yet to be manufactured pass to the buyer?

When goods are put up for sale at auction, when is the sale complete? When may a bidder retract his bid? May the seller bid on his own goods offered for sale? What is a "by-bidder?" Is it lawful to have by-bidders?

What is meant by bulk sale law? What is its purpose?

CASE PROBLEMS

Case problem No. 105.—Brownson sold his automobile to Blake at 9 o'clock on August 4. He gave Blake a written order on the garage where the automobile was kept. At 11 o'clock, and before the order was presented, the garage was completely destroyed by fire. Blake sues Brownson for the value of the automobile. Result?

Case problem No. 106.—Gordon agreed to buy from Hamilton a quantity of wood the latter had for sale, the wood to be cut into two-foot lengths. Before the wood was so cut creditors of Hamilton seized the wood under a writ of execution. Gordon claims the wood. What right if any does he have to it?

Case problem No. 107.—A jeweler sent two diamond rings to a customer under an agreement that if she was pleased with them she would keep them and pay an agreed price, but if she was not pleased she was to return them within a reasonable time. The rings were lost before they were returned to the jeweler, but without any fault of the customer. Upon whom must the loss fall? Was the title in the seller or purchaser at the time the loss occurred?

Case problem No. 108.—Roe purchased of Davis a piano for \$200.00, on what is known as the installment plan, the title to remain in Davis until the final payment was made. When \$100.00 of the purchase money had been paid, Roe's residence, including the piano, was destroyed by fire. Who should sustain the loss of the piano? If this piano had been destroyed on the day of sale, but before it had been delivered, or a payment had been made, what would your answer be?

Case problem No. 109.—Brown agreed to make a wagon for Smith out of materials to be furnished by Brown. Brown proceeded to build the wagon. Smith advanced some money on the wagon before it was begun, and as it proceeded he examined the work and expressed his approval and also advanced more money. When the wagon was nearly finished, and before it was delivered, the wagon was destroyed by fire, and Brown was unable to deliver it at the time agreed upon. Smith sued Brown. What defense, if any, did Brown have?

CHAPTER XXV.

RIGHTS OF THE UNPAID SELLER.

§ 154. **Seller's lien.**—Notwithstanding that the title in the goods may have passed to the buyer, the unpaid seller has a right or lien on them for the price while they are in his possession. A lien is a “right to hold goods, the property of another, in security for some debt, duty, or other obligation.” In a sale of goods on credit or an agreement to deliver at a certain place, the seller must comply with the conditions of the sale. A tender of payment discharges the lien.

§ 155. **Stoppage in transitu.**—A seller who has placed goods in the charge of a carrier for delivery to a buyer at a distance may retake the goods at any time while in transit if they are unpaid and the purchaser is insolvent, or became so before the sale. This is a right conferred by the law upon the unpaid seller and is known as the right of *stoppage in transitu*. It is based upon the principle that one man's goods should not be applied to the payment of another's debts.

The right of *stoppage in transitu* was first recognized and enforced in England in the year 1690. (*Wiseman v. Vandepult*, 2 Vern. 203.)

The conditions under which the vendor may exercise this right are these:

First. The goods sold must be unpaid for;

Second. The buyer must be insolvent;

Third. The goods must be in the hands of a third person in transit from the seller to the buyer.

Insolvency.—The buyer need not be an adjudged bankrupt or insolvent in a legal proceeding. It includes everyone unable to pay his debts in the ordinary course of business. However, the seller exercising this right does so at his peril. If the buyer should be solvent, the former will be liable for any damages resulting from the stoppage. The buyer can always defeat the right by paying for the goods.

In transit.—The goods are considered in transit until they are delivered to the buyer. If the goods are at their destination but in the possession of the carrier or some middleman, the unpaid seller may exercise his right of *stoppage in transitu*. He may do this by describing the goods, stating the right exists, and ordering the carrier not to deliver them to the consignee. The carrier must redeliver them to the seller, whose duty it is

to pay the transportation charges and the expenses of the re-delivery.

Performance of the Contract.

§ 156. **Delivery.**—It is the seller's duty to deliver the possession of the article sold to the buyer, or someone designated by him. Delivery is placing the property at the disposal of the buyer. This must be done in accordance with the terms of the contract.

(1) *Time and place.*—When neither time nor place of delivery is specified, it must be at the place where the property is when the sale is made. The usages of trade will influence the matter of delivery to some extent. The practice of ordering groceries over the telephone impliedly obligates the delivery to the customer's house, while a strict rule of law would not require the delivery outside the place of business. When the seller is bound to send the goods to the buyer, but no time for sending them is fixed, it must be within a reasonable time. "Under a contract for 2,500 cigars to be shipped at once" the seller cannot wait nineteen days before shipping.

(2) *Wrong quantity.*—The buyer has the right to insist that the proper quantity be delivered. If the contract is for a definite quantity, the buyer may refuse to accept if more or less is tendered. On the other hand, he may accept the amount delivered, in which case the acceptance would amount to a new contract. Unless otherwise agreed, the buyer need not accept the delivery by installments. The buyer is not bound to return to the seller goods wrongly delivered. It is sufficient if he notifies the seller that he refuses to accept them.

(3) *Delivery to a carrier.*—Where the agreement is that goods are to be sent by a carrier to the buyer living in a distant city, delivery to the carrier will be considered delivery to the buyer. The seller must send them as directed, and when he has done so his responsibility ceases as completely as though they were placed in the immediate hands of the owner.

(4) *Refusal to accept.*—It is the duty of the buyer to accept the goods, and he will be liable to the seller for any loss occasioned by his neglect or refusal to take them, and for reasonable charge for their care and custody. The purchaser of a particular article is not obliged to take another in its place, although it may be just like the one sold.

The seller usually has his choice of three courses to follow when the buyer refuses to accept the goods.

First.—The seller may keep the goods subject to the call for them by the purchaser and sue the buyer for the purchase price.

Second.—The seller may resell the property and recover from the first buyer the difference between the new and the old price.

Third.—The seller may keep the property for himself and sue the purchaser

for the difference between its value and the price the buyer agreed to pay for it. (155 N. Y. 481.)

When the buyer wrongfully refuses to accept the goods, the seller having the goods in his possession may resell them and recover the difference between the contract price, and the price received on a resale, the seller acting in good faith and exercising diligence to effect a sale at the best price.

If there is no market value at the time and place of a buyer's wrongful refusal to accept the goods, the seller may hold them for a reasonable time, or seek a market within a reasonable time. (167 Mich. 218.)

QUESTIONS

What right does the unpaid seller have to goods yet in his possession? How may this right be discharged?

What is a **stoppage in transitu** and when does such right exist? On what theory is it based? Name the several conditions under which the vendor may exercise this right. How can the buyer always defeat this right? When are the goods considered (a) in transit? (b) not in transit?

Is it the duty of the seller to deliver the goods or the buyer to send for them? What is delivery?

When neither the time nor the place is designated, what is deemed to be proper in regard to delivery? Orders for goods over the telephone impliedly obligates their delivery where?

What is the rule in regard to a delivery of the wrong quantity? If the seller sends a larger quantity than the contract calls for, what are the buyer's rights? What if a lesser quantity? Need the buyer accept the delivery in installments?

When the agreement is that the goods are to be sent by a carrier to the buyer living in a distant city, when is the delivery deemed to have been made? When will the seller be liable as insurer of goods in transit?

What is the chief duty of the buyer? In what ways may the buyer indicate his acceptance of the goods? What may the seller do when the buyer refuses to accept the goods delivered?

CASE PROBLEMS

Case problem No. 110.—A traveling salesman for a wholesale house took an order from a retail merchant for a carload of sugar. At that time the merchant made a financial statement showing he was worth \$5,000.00, and that his indebtedness did not exceed \$1,000.00. This statement was sent to the wholesale house with the order. Relying upon the statement, the house shipped the sugar to the merchant, but before it was delivered the house learned that the financial statement was false, and furthermore that the merchant was insolvent at the time the order was given. What right has the wholesale house with regard to the sugar? What is the first step the wholesale house should take in protecting this right?

Case problem No. 111.—In March, Shaw contracted to deliver to Hope, before the first of May, 500 bushels of corn at 50 cents per bushel. Shaw delivered 30 bushels in April, none in May, and 300 bushels in June, all of which Hope accepted. Is Shaw entitled to recover for any part of the corn delivered, and how much?

CHAPTER XXVI.

WARRANTIES.

§ 157. **Definition.**—A warranty is a legal obligation or undertaking by the seller that the property is, or shall be, as it is represented or promised to be.

A warranty may be express or implied. It may relate either to the title or quality.

§ 158. **Express warranties.**—An express warranty is one the parties have expressly agreed upon. It is mentioned in the contract. No particular form of words is necessary to make a warranty; the seller need not “warrant” or “guarantee.” It will be sufficient if the vendor asserts a fact of which the buyer is ignorant and on which he relies, in making the purchase.

Where there is an express warranty the purchaser may recover damages suffered by a breach of the warranty, but it will not discharge the contract. Such an agreement will enable the buyer to recover damages from the seller when he might not have had any redress if there had been no warranty.

A statement by the seller of his opinion or belief as to the value or merits of the article, or commendations usually used to induce a purchase are not considered warranties. Such expressions are regarded as “puffs” or “trade talk.” “This is the best on the market” is an expression of an opinion, and not a warranty. A horse represented to be kind in single or double harness does not include a warranty that he will not take fright at an automobile.

A warranty does not extend to defects that are actually known or apparent or which require no skill to detect unless the seller used some artifice to conceal the defects.

Roe sold to Jones a motor truck and warranted that it would carry eight thousand pounds. It failed to carry this amount. Jones could recover damages from Roe on his express warranty. If there had been no stipulation as to the amount the truck would carry, Jones would have had no redress against Roe.

§ 159. **Caveat emptor.**—This is a Latin phrase used in reference to the sale of goods. Translated it means “let the buyer beware.” This is one of the oldest rules of the common law. Its purpose is to decrease litigation and to make men self-reliant by demanding reliance upon their own judgment. If the buyer gets the worst of the bargain he can not blame someone else for his own carelessness. Under this rule of law there is no implied warranty of quality or fitness where the goods are or may

be inspected by the purchaser. In the absence of fraud or concealment the buyer can not claim damages for defects which might have been detected by ordinary inspection. It is the duty of the buyer to inspect and test what is bought. The improper labeling or marking of goods would be a fraud; a purchaser has a right to rely on the correctness of such labeling. The seller has no right to deceive the purchaser, but he need not prevent the buyer from deceiving himself. If the latter is unwilling to rely on his own judgment he should demand an express warranty from the seller against defects.

§ 160. **Implied warranties.**—In every sale of property there are certain implied warranties. They are not in addition to the contract, but are a part of it, although they need not be expressed orally or be mentioned in writing. Implied warranties will extend to the title, quality, and quantity of the goods sold.

(a) *Warranty of title.*—There is an implied warranty on the part of the seller that he has a right to sell the goods in his possession at the time of the sale. Should a third party prove title as the true owner, the buyer may recover damages against the vendor. The seller may, however, merely sell whatever right he has in the property. Under such circumstances the warranty would extend only to whatever title the seller had at the time, and no other.

It will be noted that there is no implied warranty of title in the sale of real estate. In such a sale the warranty must be expressly "covenanted" or the buyer will be without a remedy if the title should chance to be defective. The rule does not apply either to an officer or to one who is acting for another.

An executor, administrator, trustee, or sheriff who sells property by virtue of authority of law and in an official capacity confers no implied warranty of title. In such a sale the seller transfers only such title as the person had whom he represented. A pawnbroker who sells an unredeemed pledge is not liable on an implied warranty of title.

(b) *Warranty of quality.*—Where a thing is bought for a particular use or purpose, and this is known to the seller, there is an implied warranty that it will be reasonably fit for that purpose. This rule applies to articles to be delivered in the future and not to goods the buyer may have examined, selected, or had manufactured according to furnished specifications. Nor does it apply to the sale of a specified article sold under its patent or other trade name.

The application of the principle of the implied warranty of fitness is somewhat difficult. Each case must depend very largely upon the particular facts involved. The buyer always has it in his power to make the seller responsible by an express warranty that the thing bought will be sufficient for the purpose intended.

Adams gave the Acme Manufacturing Company an order for a number of "liquid soap holders" suitable for the use of workmen in shops. The undertaking of the company to furnish them was an implied warranty as to their being suitable for the purpose designated.

Plaintiff ordered defendant to construct a boiler of a specified size, make, and power. The defendant constructed the boiler according to specifications, but it would not develop sufficient power to operate plaintiff's plant. The defendant was not held liable since he had followed instructions.

In an early case it was said, "If a man says to another, 'Sell me a horse fit to carry me,' and the other sells a horse which he knows to be unfit to ride, he may be liable for the consequence; but if a man says, 'Sell me that gray horse to ride,' and the other sells it, knowing that the buyer will not be able to ride it, that would not make him liable." If he had said, "Sell me that gray horse if he is fit to ride," and the seller had sold the horse, knowing he was unfit to ride, he would have been liable.

(c) *Sale by description*.—There is an implied warranty in a sale of goods by description that the article conforms to the description, both in kind and quantity. In addition, the thing sold must also be merchantable. The buyer has a right to expect a salable article answering the description in the contract. There is no implied warranty if the buyer examined the article before it was bought and there were defects apparent which such an examination should have revealed. Of course the seller does not impliedly warrant that it will continue merchantable. If it is something to be shipped to a distance—especially any kind of provisions—it must be fit at the time it is shipped.

In the sale of articles of food for immediate domestic consumption there is an implied warranty that the articles are good, wholesome, and fit for use. In some jurisdictions the rule does not apply where the sale is between dealers, and the provisions are sold as merchandise.

While a butcher or grocer impliedly warrants the wholesomeness of his goods, if a farmer sells an animal to the butcher to be killed and sold as meat, or a load of beans to the grocer, there is no implied warranty as to quality.

A butcher sold to the plaintiff pork that turned out to be unwholesome and unfit for use and caused those who partook of it to become sick. The defendant did not know the meat was unwholesome, but he was nevertheless held liable. The vendor has better facilities for ascertaining the soundness or unsoundness of the article offered for sale than the purchaser, and it is safer to hold the vendor liable than to compel the buyer to assume the risk. (171 Ill. 93.)

(d) *Sale by sample*.—There is an implied warranty that in a sale by sample the goods will conform to the sample in kind and quality. To constitute a sale by sample it must be intended as such by the parties and the sample must be exhibited to the buyer as a sample of the thing to be sold. If there are defects in the sample the purchaser can not complain of defects in the bulk of the goods purchased.

§ 161. *Remedies for breach of warranty*.—The remedies provided in the sales act are those well established by the courts

generally. Where there is a breach of warranty the buyer may, at his election:

First. Keep the goods and bring a suit against the seller for damages for the breach of warranty.

Second. If the title has not passed to the buyer, refuse to receive the goods and maintain an action against the seller for damages upon a discovery of the breach of the warranty.

Third. Rescind the sale; that is, return the goods, or offer to return them if they have been already received, and recover the price, or any part that may have been paid.

The buyer can not rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to return or offer to return the goods in substantially as good condition as they were when received. If the deterioration is due to the breach of warranty, such injury will not be charged to the buyer in rescinding the sale and returning the goods.

Fourth. If the seller refuses to accept the offer of the return of the goods from the buyer when such right exists, the buyer may hold them as bailee for the seller.

Fifth. Where there has been a breach of an express warranty, the measure of damages will be the difference between what the goods were actually worth and what they would have been worth if they were as represented.

Sixth. In the case of a breach of an implied warranty, the damages will be the difference between the value of the goods at the time of the delivery and their value had they answered to the warranty.

QUESTIONS

What is a warranty? To what may the warranty relate? What is an express warranty? What particular form of words are necessary? Give an example of an express warranty. What is the effect of a breach of an express warranty?

What is the difference between an expression of an opinion and a warranty? What is a "puff?" If a defect is apparent or requires no skill to detect, is it covered by a warranty of any kind?

What is the meaning of *caveat emptor*? In what cases is it applicable? And what is its purpose? Is it the duty of the seller to prevent the buyer from deceiving himself? If a buyer looks at an article and says he will take it, must he keep it although he is afterwards disappointed in it?

Can the purchaser accept goods, knowing that they are not as represented and then claim damages for a breach of warranty?

What is the measure of damages for a breach of warranty?

To what do implied warranties extend? What is the implied warranty of the seller as to this title? What title does one acquire where the thing is sold by virtue of authority of law? What is the liability of a pawnbroker, who sells an unredeemed pledge on an implied warranty of title?

What is the rule as to warranty covering (a) quality? (b) fitness?

What is the implied warranty in regard to goods sold by description? Must they be salable articles? If for domestic consumption, wholesome and fit for use? How long must they remain so?

How extensive is the implied warranty as to goods sold by sample?

State the five remedies the buyer has where there is a breach of warranty?

Write a recapitulation of the subject of sales.

CASE PROBLEMS

Case problem No. 112.—Roe sold and delivered to Doe a horse for which Doe paid the agreed price. The horse was diseased, but this was unknown to either party at the time of the sale. Roe made no warranties nor false representations concerning the horse. Afterwards, Roe, at the solicitation of Doe, gave a written warranty of the soundness of the horse. After that it was discovered the horse was unsound, and Doe sued Roe on his warranty. Can he recover?

Case problem No. 113.—Dodd sold Davis a quantity of wheat, stating that it was "good wheat." In your opinion is this a warranty or an expression of opinion?

Case problem No. 114.—Plaintiff ordered from the manufacturer a windmill he found to be worthless on account of defective material and workmanship. State the various remedies the plaintiff has against the manufacturer.

Case problem No. 115.—Doe bought a horse at a sheriff's sale. The horse was mortgaged. Can Doe recover on an implied warranty of title from the sheriff? Can the mortgagee take the horse from Doe?

Case problem No. 116.—Lucas bought a horse from Thompson which had a blind eye. Lucas could have discovered this defect if he had gone to the barn nearby and examined the horse. However, Lucas relied on Thompson's warranty that the horse was sound. Can Lucas recover damages for the blindness of the horse?

Case problem No. 117.—A contractor sold a furnace to be installed in the defendant's house by the contractor. The furnace was duly installed. It was a well made furnace, but for some unknown cause it did not heat the house. The defendant refused to accept the furnace or to pay for it. The contractor sued for the price. Is he entitled to recover?

Case problem No. 118.—The purchaser went with a clerk of plaintiff to look at 110 barrels of apples piled up in tiers in a railway depot. They opened two barrels that stood on the floor. The purchaser being lame requested the clerk to climb up and open a barrel on the top tier. He did so and showed the purchaser some apples which were in good condition, also saying they were all like that. Did the purchaser have a right to rely on the samples shown him or should he have had all the barrels opened?

Case problem No. 119.—Allen sold and delivered to Brown a horse and warranted it to be sound and healthy. The horse was unsound, but neither party knew it until after the sale had been completed. What may Brown do in the premises?

CHAPTER XXVII.

BAILMENTS.

Introduction, Definition, and General Principles.

§ 162. **Bailments in general.**—Bailments apply only to personal property. The law of bailments covers practically every case where the property of a person, firm, or corporation is placed in the possession of another for use, for safekeeping, or to have work done upon it. It includes property either pledged to another to secure a debt, or put in charge of a common carrier (as a steamboat or railroad company) to be transported to some other place. Property taken under an order of court by an officer, or lost property held by the finder, is included under the same law.

The law of bailments is built largely upon the civil law of the Romans, with this difference, however, that under their law, land, as well as personal property, was included. This ancient origin is further seen in the Latin names given by some authorities to the different classes of bailments, as follows:

First. Depositum; where A gives to B an article to keep for him in A's absence, without reward.

Second. Mandatum; where A may ask B, as a favor, to bind a book belonging to A; or A may request B to carry a basket of eggs to market for A, gratis.

Third. Commodatum; where B borrows from A some useful article without paying, or giving some favor in return, for its use.

Fourth. Pignus; (a pawn or pledge) where A puts personal property in B's charge to secure a debt.

Fifth. Locatio; where B either hires the article from A; or B hires A to take charge of his property, or do work and labor upon it, or move it from place to place, etc.

§ 163. **Definition.**—A bailment is the holding in trust of another's property for some definite purpose, to be returned or otherwise disposed of when that purpose is accomplished. Bailment is derived from the French word "bailer," signifying to deliver. But in modern times the term has become so modified and broadened as to include the possession of property without a transfer of ownership, and after a lapse of a certain time or the happening of some event the goods are to be returned to the owner or his nominee.

§ 164. **Parties.**—There are two parties to a bailment: the one who delivers the goods, called the bailor; the person to whom they are delivered, the bailee. Bailments being founded upon a contract, express or implied, the parties must be capable of contracting. They are also governed by the same rules as are other contracts.

§ 165. **Distinctions.**—In a bailment, the bailee merely has the

right of possession (not ownership) for the purpose for which the bailment was created, after which the identical property, although possibly in an altered form, is to be returned to the bailor, or to someone designated by him. In a sale, the absolute title, or ownership, is transferred to the purchaser, although the possession may still remain in the seller. If other property than that received by the bailee is to be returned to the bailor, then it is termed a barter and has the same effect, so far as ownership is concerned, as a sale. If the bailee has an option to purchase goods in his possession, the bailment becomes a sale when the bailee signifies his intention to purchase.

Johnson, the plaintiff, delivered to the defendant, a miller, a certain quantity of wheat, in exchange for which the miller was to give to the plaintiff a number of barrels of flour already ground. This was held to be a barter. (4 N. Y. 76.)

But if Johnson should deliver to the miller a certain quantity of wheat and the miller convert the wheat into flour, returning the identical wheat in the form of flour, then it would be a bailment.

Money deposited in a bank is not a bailment, for it is not intended that the identical coin or notes the bank received are to be returned to the depositor, but the amount due in any form of legal tender. A coin loaned to one to perform a sleight-of-hand trick would be a bailment, because it is intended that the same coin shall be returned.

It has been held that a wagon worth ten dollars receiving repairs amounting to \$80.00 was a bailment because it was the same property returned—although in a much altered form.

These distinctions between a sale, a barter, and bailment are important in order to determine upon whom the loss shall fall, if the property is destroyed while in the care of another person. If the transaction is a bailment and the property is destroyed, through no fault of the bailee, it would be the bailor's loss. On the other hand, if it is a sale or barter, the loss, if any, would fall upon the owner of the property.

§ 166. **Classification of bailments.**—The modern tendency is to classify bailments under three heads, as follows:

First. Bailments for the sole benefit of the bailor.

Second. Bailments for the sole benefit of the bailee.

Third. Bailments for the mutual benefit of the bailor and bailee.

The need of the foregoing classification is for the purpose of defining the degree of care or diligence required of the bailee, and his liability for negligence in a failure to perform his obligations properly. Every bailee is bound to take some care of the property of others in his keeping, regardless of the kind of a bailment it may be, but the degree of care or liability will depend upon the nature of the bailment, the character of the property, and the custom of the locality.

§ 167. **Degrees of care and of negligence.**—In bailments the three recognized degrees of care or diligence and the corresponding degrees of negligence respectively are: (a) slight care;

(b) ordinary care; and (c) great or more than ordinary care; and (a) gross negligence; (b) ordinary negligence; and (c) slight negligence.

Care has been defined to be that diligence which a person is wont to show in the conduct or management of his own affairs; while negligence is the absence of diligence or the omission to do something which a prudent and reasonable man would do.

Slight care is that degree of care that inattentive or careless persons exercise in dealing with their own property. The absence of such care is considered gross negligence.

Ordinary care is that degree of diligence exercised by persons of common and ordinary prudence in respect to their own property. The absence of such care is ordinary negligence.

Great care or extraordinary diligence is the highest degree of care; it is that degree which persons of exceptional prudence use with respect to their own affairs. The absence of such care is slight negligence.

QUESTIONS

To what kind of property do bailments apply? What are some of the Latin terms used in the different classes of bailments illustrating its ancient origin? Define a bailment. What is the original meaning of the word **bailment**?

Does the law of bailment ever apply to real estate? Give five or more illustrations of bailments. Is a deposit of cash in a bank a bailment? Does the relation of bailor and bailee exist where papers, documents and securities are left at a bank to secure a loan? Are goods left with a dressmaker to be made into a suit a bailment? Will property wrongfully obtained be a bailment? How many parties to a bailment? What are they called? What are their chief characteristics?

What is the essential element in a sale that distinguishes it from a bailment? From a barter? When may a bailment become a sale? What is the object of knowing this distinction? Who retains the title to bailed property?

Name the three general classes of bailments. What is the purpose of such classification? What is every bailee bound to do? What are the three recognized degrees of care required in the law of bailment? What are the corresponding degrees of negligence? Define (a) care, (b) diligence. State the requirements exacted of the different degrees of care. What is the meaning of the words "ordinary care?"

CASE PROBLEMS

Case problem No. 120.—Jennie Smith left her typewriter with the Acme Typewriter Co. to be overhauled and repaired. The following day the owner of the building occupied by the typewriter company brought suit for rent on the building and levied an attachment on all the property in the rooms of the typewriter company. Jennie requested the constable to return her machine but the owner of the building said that was a matter for her to settle with the typewriter company. In your opinion is Jennie entitled to her machine? (*Foster v. Pettibone*, 7 New York Reports 433.)

Was the constable a bailee of the typewriter?

Case problem No. 121.—Harris went into a barber shop and deposited his hat on a rack hung in the shop for that purpose. While he was being shaved, the hat disappeared from the shop and was lost. With reasonable care on the part of the proprietor the loss might have been averted. Is the proprietor a bailee and therefore liable? What would be the value of a notice disclaiming responsibility? (*Dilberto v. Harris*, 95 Ga. 571.)

CHAPTER XXVIII.

RIGHTS OF THE BAILOR AND BAILEE.

§ 168. **Bailment for the bailor's benefit.**—The bailee is bound to exercise but slight care and diligence where the bailment is for the sole benefit of the bailor, and in the event of the loss he can be held responsible only for bad faith, or gross negligence. An illustration of this kind of a bailment would be where property is placed with another for safe keeping, or to be carried to some other place, or for the purpose of having some work done on it for the advantage and benefit of the bailor, for which the bailee receives no compensation or derives no benefit for his care or service. Persons do not ordinarily expect superior care to be given in exchange for gratuitous service, and one does not usually get more than he anticipates. The bailee's liability would also depend somewhat on the character of the property intrusted to his keeping. It is obvious that the responsibility for the care of jewelry would be greater than for that of junk.

§ 169. **Law of finding.**—The finder of a lost article becomes the bailee of it for the owner—without compensation unless otherwise provided by statutory law. The old rule of "finding is keeping" is no longer a part of the common law. But the finder of a lost article has a clear title to it against everyone but the rightful owner; and if he takes such property into his possession, he at once becomes responsible for its safe keeping and return. He may also get into serious trouble unless he makes the proper effort to locate the true owner. The circumstances of each particular case will determine just what is a reasonable effort.

The statutes of some jurisdictions provide that if the value of the article lost exceeds a certain amount, the finder must make an affidavit stating where it was found, that the owner is unknown, that the finder has not secretly withheld or disposed of any part of it; and a failure to comply with these stipulations imposes a penalty upon the finder. It is not necessarily the duty of the finder to advertise for the owner unless that method seems to be the way most likely to locate him. In a few states the law is that a failure to make a reasonable effort to find the owner makes the bailee guilty of larceny.

Property found upon a street car should be turned over to the conductor, or the "lost property" department of the company (taking a receipt admitting the finder's claim)—not that the

company has the better right, but that this is the best way of locating the owner. Articles found upon the highway should be left at the nearest police station, or the authorities should be notified of the finding. If the property is not claimed within a reasonable time, the finder may insist upon its return, if left with someone else pending the discovery of the true owner.

A wallet containing a sum of money found upon the floor of a shop was handed to the shopkeeper to be returned to the owner. At the expiration of three years, the owner of the wallet not having called for it, the finder demanded its return from the shopkeeper, who refused to deliver it upon the ground that it had been found upon his premises. Upon a suit for a recovery of the wallet it was awarded to the finder, it being held that as against all the world except the owner, the title of the finder was perfect. (11 Jur. 1079.)

§ 170. **Bailments for the bailee's benefit.**—A bailee is obliged to exercise extraordinary or the utmost degree of care and diligence when the bailment is for his sole benefit; he is liable to the bailor for losses resulting from the slightest negligence. Bailments under this classification occur when property has been loaned to the bailee without giving any compensation or benefit in return, as the neighborly loan of a book. The borrower must be extremely careful of the thing borrowed, make no other use of it than that for which it was loaned; he must not loan it to anyone else, but if so loaned, the first bailee will be liable even though the second borrower used great care. Upon the accomplishment of the object for which the loan was made, the property is to be returned to the bailor. The bailee must take greater care of the property borrowed than if it were his own and bear all ordinary expenses in connection with its use; but he should be reimbursed for any extraordinary expenses which were not made necessary by the use of the property, but were incurred in its preservation. The bailee is not liable for loss resulting or damages caused by inevitable accidents, the ¹act of God, or the public enemy, provided the bailee was not at fault, or could not have prevented the loss. However, he might make himself liable by special agreement for any loss, regardless of how it occurred.

§ 171. **Bailments for the benefit of the bailor and bailee.**—Bailments for the mutual benefit of the bailor and the bailee are of common occurrence in the commercial world. A delivers his watch to B to be repaired. The bailee receives pay for his work, the bailor receives back his watch in a more valuable condition. Therefore, both parties derive benefit, profit, or convenience from such transactions. The bailee, receiving compensation, is required to take greater care than that demanded of the bailee when he serves without pay, and less than that of the gratuitous borrower. Therefore, in this class the bailee is held to ordinary diligence or care, and is consequently liable

¹ See page 151 for meaning of these terms.

only for loss or injury occasioned by ordinary negligence. Of course, property of great value or that which might be easily destroyed or lost would require more care than something of little value, or that which could not easily be destroyed or lost. More attention should be given to a watch than a wagon. So what might be proper care in mending a plow might be the greatest negligence as applied to the repair of a piano.

Mutual benefit bailments include the delivery of goods to a carrier to be transported from one place to another and of hiring and pledging. (See § 179.)

A bailment of hire is created when one rents a piano or typewriter, hires a horse and buggy from a liveryman, places a horse in a livery stable to board, delivers wheat to an elevator or furniture or other goods to a warehouse for storage, leaves a bicycle or watch for repairs, or goods with a dressmaker to be made into a garment, or takes cattle to graze or pasture (in law this is called agistment).

The placing of a chattel in the hands of a bailee as security for a debt or obligation is a pledge or pawn.

In the hire of an animal, the bailee is not responsible for the loss if it becomes sick or dies while in his care; but he would be liable for cruel or excessive driving. But if he should hire the horse to go to a certain place and should go beyond, or use it for some other purpose than that specified, the bailee is responsible for any loss or damage happening during such unwarranted use. When a liveryman lets a horse, there is an implied warranty on his part that the animal supplied is fit for the purpose of driving, even though he did not know it was vicious. It follows that if the horse should run away, the bailee exercising due care would not be bound to pay for damages, but on the other hand the liveryman would be liable for any injuries the driver or his family might sustain.

Where a person undertakes work and labor on the thing delivered, as goods to be made into clothing, a watch to be repaired or a gem to be set, it is impliedly understood that he possesses the requisite skill and is bound to use it in the whole of the undertaking, performing his duty in a workmanlike manner. He must also take ordinary care of the property and is answerable for ordinary neglect. The bailee has a right to undisturbed possession until the work is finished, when he has a right to his pay; and until he receives the pay he is entitled to a lien upon the chattel for his services. If the material delivered should be destroyed without the fault or neglect of the workman and before the work upon it is completed, the laborer would be entitled to compensation for the amount of work actually done.

Upon the termination of the bailment contract, it is the duty of the bailee to return the identical property to the bailor or his

agent, together with all natural accessions to the property; as, for example, an animal's offspring, born during the time the bailment was in effect.

§ 172. **Warehouseman.**—A warehouseman is one lawfully engaged in the business of storing goods for profit. In some states it is necessary to secure a license from the authorities before engaging in this business; and the duties and liabilities of such persons are prescribed by statutes.

A private warehouseman may select his customers and accept goods for storage from whomever he chooses. He may issue a "warehouse receipt" for the goods received by him; such receipts must contain a description of the goods, give the location of the warehouse, rate of storage charges, and date of issue, and state to whom the goods will be delivered, together with a statement of any lien the warehouseman may have on the particular property stored. This receipt may be negotiable in character, which will permit the holder to transfer it by indorsement so as to give the indorsee the right to claim the goods, under certain conditions, upon the presentation of the receipt. This is a common practice where grain is stored.

A warehouseman who issues a negotiable receipt knowing that the goods for which the receipt is issued have not been actually received or are not actually under his control at the time of issuing, or knowing that the receipt contains a false statement, is guilty of a crime and can be punished accordingly.

A warehouseman will be held liable for any loss or injury to the goods caused by his failure to employ such care as a reasonably careful owner of similar goods would exercise; he does not become the insurer except by special arrangements.

The goods must be kept separate from the goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, unless otherwise authorized by agreement or custom. If he mixes the goods with his own he will suffer the loss and inconvenience, if any should arise, even to the extent of losing his own goods entirely. If authorized by custom or agreement to mingle certain kinds, as grain of the same kind and grade, or similar merchandise, then the depositors would own the entire mass in common, and each one would be entitled to such portion as the amount he deposited would bear to the whole amount; and the warehouseman is liable to each depositor for each one's share under the same circumstances as if the goods had been kept separate.

After all proper charges have been paid, the owner is entitled to the return of his specific goods, or for his share where they have been commingled according to agreement or custom. On the other hand, the warehouseman has a lien on the goods de-

posited for all lawful charges for storage, money advanced, and cost of sale where default has been made.

§ 173. **Pledge.**—Personal property deposited as security for some debt or obligation, with power to sell upon the failure of the person depositing to keep his engagement is termed a *pledge*. The word “pawn” is applied in ordinary business usage to dealings with a class called “pawnbrokers,” who lend money on goods deposited with them as security for the payment of a debt. The statutes prescribe the amount of interest they may charge, together with their other duties and liabilities. In commercial or financial transactions, stocks, bonds, bills, notes, and like instruments deposited as a pledge are termed “collateral securities.” A vast amount of the money loaned by banks is secured by commercial paper of this kind.

The parties to a pledge must be competent to contract. The one delivering the property is called the *pledgor* while the one to whom the delivery is made is called the *pledgee*.

A pledge covers not only the debt secured, but the interest upon it, and all other necessary expenses that may be attached. The pledgee may not hold the pledge for any other debt than that for which it was specifically made—except under special agreement. If the property is of such nature as to be a charge upon the pledgee he may use it in a reasonable manner, but if he derives a profit he must apply it on the payment of the debt after deducting necessary charges and expenses. If the property can not be used without injury the bailee would be responsible for the loss sustained, or even if its use would not be detrimental the bailee would be liable for its unwarranted use. Upon the termination of the pledge the identical property pledged must be returned, and not articles of a similar kind or value.

The pledgee must take ordinary care in keeping and preserving the pledged property and is answerable for ordinary negligence.

If the debt is not paid when due, the property may be sold at public sale and the proceeds used to satisfy the claim; but if there is a surplus after the obligations and expenses are paid, the balance belongs to the pledgor. In case a sale is necessary the pledgor must be notified that he is in default and that the property will be sold, unless these rights have been previously waived, nor can the pledgee buy in the property or keep it in satisfaction of the debt unless there is an agreement to that effect.

A pawnbroker is not required to sell unredeemed pledges at a public auction, but may sell at private sale, the law usually requiring him to keep the property for a specified time after default is made and before offering it for sale.

Stolen property pledged by the thief may be reclaimed by the lawful owner.

Allen loaned money to Dubois, taking the latter's note, secured by pledge of certificates of certain shares of stock of the Iron Silver Mining Company. Allen sold these particular shares, but was ready at all times to account for similar shares for like amounts. Allen demanded payment of the note and tendered Dubois these similar shares. At the time the shares pledged were sold the price was up; at the time payment on the note was demanded the price was down. The court held that Dubois could demand his identical certificates, and if they were not produced, Allen must account for their value at the time of their conversion. The difference in price was sufficient to cancel Dubois' indebtedness, and give him judgment for an additional sum. (75 N. W. 443.)

QUESTIONS

Illustrate a bailment for the sole benefit of the bailor. Explain the degree of care required where the bailment is for the sole benefit of the bailor. What is the bailee's liability? What does the character of the property bailed have to do with this liability? For what degree of negligence is a gratuitous bailee liable? Illustrate gross negligence in a gratuitous bailee.

Is the finder of a lost article a bailee? When one undertakes to take charge of lost property what liability does he thereby assume? Does the bailee of lost property ever become the absolute owner of it?

Give several illustrations of a bailment for the bailee's sole benefit.

Upon what should every degree of care depend? What degree of care must the bailor bestow on goods where the bailment is for his sole benefit? What use may he make of the article so bailed? What degree of care must one take of borrowed property? May he incur any expenses in connection with its use? For what loss is he liable? May he be liable for additional loss?

Give several illustrations of a bailment for the mutual benefit of the bailor and the bailee. Why is less care required where the bailment is for the benefit of both parties than in the other kinds of bailments? What degree of liability applies? What is a bailment for hire? Give several illustrations.

Will the bailee be responsible for the loss of a horse if it becomes sick and dies while in his care? What is the bailee's liability for an unwarranted use? What is the implied warranty as to the thing bailed? What is the implied warranty of the bailee as to his skill and ability to do the thing underaken?

What is the bailee's lien? Upon the termination of the bailment what is the duty of the bailee?

What is a warehouseman? Name several warehouses in your city.

Do the statute of your state regulate the warehouse business? What is a warehouse receipt and what does it ordinarily contain? What is the value of a negotiable warehouse receipt? What is the liability of a warehouseman? When does he become the insurer of property intrusted to his care? What is the rule in regard to (a) mixing goods, (b) mingling certain kinds of grain? What is a warehouseman's lien?

What is a pledge, and how does it differ from a chattel mortgage? (The teacher should explain the difference.) What kind of property may be pledged? What is a pawn? What are collateral securities?

What does a pledge cover. Does the pledgee have the exclusive right of possession to the property pledged, or not? If so, against whom is it good and how long does it continue?

Is the pledge bound to do more than safely preserve the pledged property? Define negligence by a pledgee, in terms of care. May the pledgee use the article pledged? Who is entitled to the increase and why? What must the pledgee do in regard to keeping an account with the property?

In what ways may the pledgee foreclose his lien? And may he ever become the purchaser of the property pledged?

Submit to your teacher a recapitulation of the subject of bailments.

CASE PROBLEMS

Case problem No. 122.—Adams was going to the town of X. Brown asked Adams as a favor, and without compensation, to carry a sack of corn and a gold watch for him and deliver them to Coone. Adams put them into his buggy, and, while on the way, left the buggy standing by the road without removing the corn or the watch and went into a house for dinner. While he was gone the corn and watch were stolen. What is Adams liability?

Case problem No. 123.—Manning borrowed a horse from his neighbor and rode to a town five miles distant, where he tied it close to another horse, which kicked and severely injured the borrowed horse. Is Manning liable in damages for the injured horse? Give reasons.

Case problem No. 124.—A farmer gratuitously loaned his horse to a neighbor who used ordinary care in looking after it; but while in the neighbor's possession, it took cold and died. If the latter had taken extraordinary care, the horse would not have died. Is the neighbor liable to the farmer for the loss of the horse? What is the law in this respect?

Case problem No. 125.—Jones hired a team to go to a neighboring city. On his arrival he placed the team in a livery stable, to be cared for during the noon hour. While there, one of the horses met with a serious accident and had to be shot. The liveryman from whom Jones hired the horse sued him for its value. Does the liveryman have a valid claim?

Case problem No. 126.—Valuable jewelry was carelessly left in clothes sent to a cleaner. This jewelry came into the hands of employees of the cleaner without his knowledge or consent. The jewelry was not recovered. What is the cleaner's liability?

Case problem No. 127.—A farmer delivered his team of horses to the keeper of a livery and feed barn to be cared for over night. During the night the horses and barn were destroyed by fire. Is the liveryman liable for the loss of the horses? What, if anything, must the liveryman show to relieve himself from liability?

Case problem No. 128.—King owned and operated a public warehouse. J— delivered to him at his warehouse 200 bushels of wheat for storage for sixty days. The custom of the warehouseman was, in such cases, to commingle wheat of like quality which had been deposited for storage by his various customers, and from such general mass return to each customer from time to time the amount so deposited. Of this custom J— was fully informed, and the wheat so deposited by him was commingled with the common mass. Before the expiration of sixty days, King failed and made an assignment for the benefit of his creditors. Wheat of the quality deposited by J—, equal in amount to all of the wheat of like quality in storage at the time of the failure, was turned over to the assignee; but the assignee refused to deliver any of such wheat to J—. What are J—'s legal rights, if any, to this wheat?

CHAPTER XXIX.

HOTELKEEPERS, INNKEEPERS, AND BOARDINGHOUSE KEEPERS.

§ 174. **Innkeepers.**—An innkeeper is a person who keeps open, for profit, an inn, tavern, hotel, or public house for the lodging and entertainment of transients and travelers. In law, hotelkeepers and innkeepers are the same. The amount of compensation that may be charged is not fixed by law—it is a matter of personal agreement. The one who keeps such a place of business is also called landlord, host, or proprietor. In early times the landlord was required to provide for the traveler's horse as well as for the man, but that is no longer so. He must, however, undertake to entertain all fit and orderly persons who apply, so far as he has facilities, and who are willing to pay the regular price, which may be demanded in advance. Admission may be denied to those who are drunk, disorderly, or suffering from a contagious or infectious disease, and if such have already entered they may be ejected.

If the inn is conducted on what is popularly known as the "European plan," providing lodging with the option of taking meals elsewhere, it is, nevertheless, an inn. But a restaurant, saloon, boardinghouse, lodginghouse, or coffeehouse is not an inn.

Steamship and sleeping car companies have been held not to be innkeepers. They do not accommodate persons indiscriminately—nor does the latter serve meals. One who occasionally entertains sojourners for a compensation is not considered an innkeeper if he does not hold himself out in that character.

§ 175. **Guests and boarders.**—A person who stays at an inn or hotel, without reference to the length of his stay, so long as he retains his character as a transient or traveler, is termed a guest. But if one stays for a fixed period, at a certain agreed rate, he is a boarder. The wayfarer may even make special arrangements for accommodations by the week or month and still be a guest.

To be a transient it is not necessary that one must reside in some other locality than where the inn is located. The attending of a ball or reception given on the premises or the depositing of goods for safe keeping does not constitute one a guest. These various distinctions are essential in order to understand the proprietor's liability and the guest's privileges in comparison with those due persons who are merely boarders.

Just when the relation of host and guest begins is sometimes an important question. It may be said that the moment a trav-

eler is accepted he becomes a guest and the length of his stay makes no difference, so long as it is not his intention of remaining permanently. In a leading case it was decided that a traveler became a guest upon the handing of his baggage check to the hotel porter at the railway station.

In many instances the proprietor may be both an innkeeper and a boardinghouse keeper, as it is not an uncommon occurrence for an inn or hotel to be conducted as a boardinghouse for those who reside there permanently. The transient guest may become a permanent boarder.

§ 176. **Duties and liabilities of an innkeeper.**—An innkeeper being engaged in a public calling, it is his duty to receive all fit persons who apply—if he has room—and a refusal without just cause makes him liable for damages. He can not discriminate as to whom he will take as a guest, or refuse because he applies on Sunday or late at night; but the guest cannot demand particular rooms, nor services of meals except at regular hours.

The responsibility of an innkeeper is greater than that of an ordinary bailee: he is bound to take extraordinary care of the person of the guest, of his family and servants, as well as of his property; he must protect the guest from the assault of the servants; he is an insurer of the property of the guest and is liable for its loss even when it arises from a fire, burglary, theft, or robbery, whether by a servant, stranger, or a fellow guest. The innkeeper is not liable for goods stolen from a neighbor, who is not a traveler, but is lodging at the inn as a friend of the landlord—and gratuitously.

The guest must observe any reasonable rules or regulations made by the innkeeper for safe-guarding property, and a failure to obey these requirements relieves the innkeeper from liability except for ordinary care. The statutes may provide for the posting of notices informing the patrons that all money and other valuables must be deposited for safekeeping and a failure to do so will relieve the innkeeper, except for losses resulting from his negligence. In some states the mere posting of the notice is not sufficient and it must be shown to have been personally brought to the knowledge of the guest.

§ 177. **Innkeeper's rights.**—The landlord has a right to demand his pay in advance; he is not bound to entertain a guest who refuses to pay lawful charges. If the landlord does not exercise his privilege of collecting in advance he has a lien on the goods and baggage of the guest for his board and lodging, and may retain them until the account is paid; but he has no right to retain the person of the guest. The statutes ordinarily provide the right to sell the property to satisfy the debt and to

return the remainder to the delinquent guest; at common law this right does not exist.

§ 178. **Boardinghouse keeper.**—A boardinghouse differs from an inn or hotel in several respects. The employment not being of a public character, the proprietor is not obliged to accept all fit persons who apply, but may select whomever he pleases. In the absence of statutory provisions he has no lien on the baggage of the boarder nor is he liable for losses arising through fire, theft, or robbery—but is held liable merely as an ordinary bailee.

The wife and children of the plaintiff, after living for some years in St. Paul, took board at a hotel in that city. The husband resided in another state but frequently visited them. During one of these visits the husband's baggage and the baggage of the wife and children were stolen. It was held that the hotel-keeper was liable for what was brought to the hotel by the husband, but not for that brought by the wife and children. (22 Minn. 468.)

QUESTIONS

Define an innkeeper. What is an inn? Is an inn always a hotel? Is a restaurant an inn? Is a sleeping car an inn? What is the difference, if any, between a hotel, an inn, and a tavern?

Is one who occasionally entertains sojourners for a compensation an innkeeper? By what title is the keeper of an inn commonly known?

Under what conditions may an innkeeper refuse to accept a traveler for a guest?

Who are guests? Distinguish guests from (a) visitors, (b) boarders, (c) trespassers. When does the relation of guest and landlord begin?

What are the general duties of an innkeeper? What are his rights and liabilities? What lien, if any, has an innkeeper on the baggage of a guest? When may he sell this property to satisfy a debt? May an innkeeper make reasonable rules regarding the disposal of the guest's property for safe keeping?

Distinguish a boardinghouse from an inn. Compare a boardinghouse keeper's rights, duties, and liabilities with those of an innkeeper.

CHAPTER XXX.

COMMON CARRIERS.

Carriers of Goods.

§ 179. **Common carriers in general.**—The most important, extensive, and useful of the contracts of bailment are undoubtedly those pertaining to common carriers. Their business being of a public nature, they are controlled by more stringent rules of law and are subjected to a higher degree of liability than attaches to an ordinary bailee; it is even greater than that of an innkeeper.

The most specific example of common carrier is that of a railroad or express company; but the following classes of persons, among others, have been expressly decided to be such, also: ferrymen, hackmen, stagecoach proprietors, canal boatmen, city transfer companies, dispatch freight lines, steamboat companies, and many others who engage in the business of transportation for hire.

The United States statutes relating to interstate transportation provide that sleeping car companies shall be classified as common carriers, but they are not so regarded under the common law and within the limits of a state.

§ 180. **Who are common carriers.**—A common carrier is a person or company who is obliged to transport, over his route, either or both the goods and person of anyone who may desire to employ him for that purpose. A transportation company engaged in the carriage of freight is a common carrier although it may have no road of its own. The calling is distinctively that of regular public employment, not as an occasional occupation, the carrier serving all persons indifferently, for a compensation, to the extent of his facilities, and a refusal makes him liable to an action at law for damages.

A private carrier is one who transports personal property for others in special cases under private contract. He is not engaged in the business as a public calling and may therefore carry for anyone he pleases. He is bound to use only ordinary care and reasonable skill; he does not insure the goods against loss except through the negligence of himself or agents.

§ 181. **Duties.**—It is the duty of a common carrier to receive such goods as come within his line of business—to the extent of his capacity—take proper care of them from the moment they are received; and comply with the reasonable directions of the owner in respect to them. The goods must be placed in the exclusive custody of the carrier or agent. Where it is the custom or usage to permit the shipper to place them on the platform at the station, such delivery is sufficient. If the goods are improperly packed, dangerous to life or property, or otherwise unfit for shipment, they may be lawfully refused.

It is also the duty of a common carrier to transport goods safely, by the usual route, to the agreed place of destination with reasonable dispatch. What would be deemed reasonable depends on the nature of the goods—stock or fruit would obviously require different treatment from iron ore or cotton. If demanded by the carrier, the payment of the charges may be exacted in advance. If the service desired is unusual, compensation accordingly may be collected. However, each shipper must be charged alike for like service—there must be no discrimination in rates. This does not prevent the making of a lower charge for a larger contract; or a proportionately lower price for what is termed a “long haul” than for a “short haul.”

It is the further duty of a common carrier to deliver the goods to the right person at the proper time and place. In the case of railroads or vessels the delivery is made at the freight depot or wharf.

§ 182. **Carrier's liabilities.**—A common carrier is regarded, in the absence of a special contract, statutory regulation, or proved custom limiting such liability, as an insurer of the property in his care until delivery, against all loss or damage occurring in any manner, unless the same is caused (a) by the act of God, (b) by the public enemy, (c) by the fault of the shipper, (d) by the inherent nature of the property; or (e) by the intervention of public authority.

The rules imposing the severe responsibility of an insurer upon a carrier of goods for the public originated in early times, when the carrier had exceptional opportunities for personally appropriating the goods placed in his care for transportation, or for defrauding the owner through connivance or collusion with thieves or pirates. This gave rise to the rule holding him absolutely responsible for all loss or damage except that caused by the act of God or the “King's enemies” (that is, public enemy), because these losses could easily be proved or disproved. It was thought that in no other way could fidelity be assured. In modern times the necessity for this strict liability is not so great and the additional exceptions mentioned have been added to those just specified.

§ 183. (1) *The act of God.*—By the act of God is meant any accident produced by physical causes which human ability could not have foreseen or prevented; it is something which human power can not prevent nor human prudence avert. Earthquakes, extraordinary and unprecedented floods, tornadoes, sudden sickness or death, and the like are acts that will excuse the carrier for loss or damage to goods in his possession. He would be excused from liabilities where goods are destroyed by fire caused by lightning, but not where the fire was started by a human being. If the negligence of the carrier contributed to the loss or if he deviated from his agreement or instructions, he will be held liable even though the proximate cause of the loss is due to the act of God.

A carload of hogs was blocked by a violent snow storm and a number of them died. It was held that the loss was not due to the storm, but the negligence of the carrier in caring for them during the detention. (1 Hilt. 235.)

Defendant agreed to send goods by one line of boats but sent them by another. He was held liable for loss to the goods caused by lightning striking the boat. (70 Am. Dec. 69.)

A ferryman attempted to cross a river while a dangerous wind was blowing; the goods were damaged by the wind storm and the ferryman was held responsible for the loss, due to his negligence. (Harp. 470.)

If a carrier should allow a car to remain on a siding an unreasonably long time, and with due care it could have been moved out of the danger zone, the loss is attributed to the negligence of the carrier and he would therefore be held responsible for damages. (30 N. Y. 630.)

§ 184. (2) *The public enemy*.—A common carrier is exempt from responsibility as an insurer for loss or damage to the goods in his charge caused by an act of the public enemy, when the encounter could not have been avoided. The carrier must use at least ordinary care to prevent the goods in his custody from falling into the hands of or being destroyed by the public enemy. By the phrase, public enemy, is meant an organized force with whom the nation is at open war, and pirates on the high seas. Mobs, robbers, highwaymen, or strikers, however numerous they may be, are never included in this class as public enemies; and losses resulting from the latter will not excuse the carrier as an insurer.

§ 185. (3) *The fault of the shipper*.—If the goods are lost or damaged through the fault, fraud, or folly of the shipper, the carrier is not liable as an insurer. The goods must be properly packed and addressed and the carrier advised as to the nature of the contents or value so that proper precautions may be taken to protect them. He must also be informed if they are of extraordinary value so that corresponding care may be taken and a rate charged proportionate to the risk.

§ 186. (4) *The inherent nature of the property*.—If loss or damage arises through the inherent nature, defect, infirmity, or vice of the property carried, or its natural wear and tear in transportation, without the fault or negligence of the carrier, the latter will not be liable as an insurer.

The foregoing exception applies to the decay of fruits, vegetables, and other perishable commodities; the evaporation and fermentation, or unavoidable leakage of liquids; and the spontaneous combustion of certain kinds of goods. It also includes injuries done by animals to themselves, and each other, by reason of their vices and vicious propensities. The transportation of animals is not subject to precisely the same rules as that of packages and inanimate articles. The carrier must feed, water and otherwise take care of the live stock on the way, unless the owner accompanies it for that purpose, and even then suitable facilities and opportunity for doing so must be furnished.

The carrier is bound to take reasonable means to guard against injuries. He must use special diligence to avoid delay in transporting perishable goods. The carrier must also take notice of any marks upon the package containing the goods which indicate the character of its contents.

§ 187. (4) *The intervention of public authority*.—The carrier is

not liable as an insurer for any loss or damage arising through the intervention of public authority, as where property is taken away from him by a judicial process, or infected goods are destroyed by a public health officer. The carrier, to avoid responsibility, must immediately give the owner notice of the seizure.

QUESTIONS

Define common carrier. Illustrate (a) the earliest types of carriers; (b) modern types. Why is the liability of a common carrier greater than that of an ordinary bailee? Explain the difference between a common carrier and a private carrier.

Are the following common carriers, and if not, why not, and what are they: (a) a farmer with his wagon, who carries by request and upon special contract? (b) a fisherman with his sloop, who carries by request and upon a special contract? (c) a tug boat? (d) a sleeping car company? (e) a street railway company? (f) an express company? (g) a transportation company that furnishes cars for through shipment over different roads?

(a) Is a livery stable keeper who merely keeps horses and carriages for hire a common carrier? (b) What legal relation exists?

Must the common carrier transport everything that is offered? Give reasons. Explain and illustrate the duties of a common carrier. May the carrier demand his pay (a) in advance? (b) what price may he charge? (c) how are rates regulated and (d) what are reasonable rates?

Give the common law liability of a common carrier. What one thing is necessary before a common carrier can be held to this extraordinary liability?

A common carrier sends his wagon to the shipper's place of business and there accepts the custody of the goods. Under what liability is the carrier?

Define an act of God and give several illustrations. Does an act of God include: (a) ordinary change of weather which could be expected? (b) loss by accidental fire? (c) strike among the carrier's employees? (d) malicious mischief? (e) destruction of the property by outsiders?

Is the carrier liable although (a) the cause is entirely beyond his control? (b) the cause could not have been foreseen by him?

Distinguish inevitable accidents from acts of God. Define public enemy. Give several illustrations. Does public enemy include (a) mobs? (b) rioters? (c) robbers? (d) pirates? (e) insurgents? How may insurgents become public enemies?

CASE PROBLEMS

Case problem No. 129.—The Shaw Transfer Co. was engaged in the business of transferring goods with teams and wagons from one part of the city to another. Murphy hired the transfer company to take some furniture from the depot to his house. On the way the wagon was run into by a street car and the furniture damaged. Neither the transfer company nor the driver was negligent; the conductor of the street car was wholly to blame for the accident. Who is liable to Murphy for the damage?

Case problem No. 130.—A wholesale merchant delivered to a common carrier in the city of Boston a carload of goods, to be conveyed and delivered at Milwaukee, Wisconsin, for which service he was to pay the carrier \$250.00. The carload of goods, after it reached Milwaukee, but before it was delivered, was, without the fault of the carrier, destroyed by an act of God. Can the carrier recover the freight charges?

Case problem No. 131.—A grain dealer loaded a car of wheat for shipment, and the railroad company issued a proper bill of lading. On account of the lack of motive power, the car remained for five days before it was moved. By reason of this delay the grain was destroyed by causes which came clearly within "an act of God." If the car had been moved within three days, it would not have been destroyed. Is the railroad company nevertheless liable?

CHAPTER XXXI.

CARRIER'S DUTIES.

§ 188. **Limitation of liability.**—Unless the statutes forbid, a common carrier may by a just and reasonable contract with the shipper be relieved from the common law liability as an insurer. Such agreements may stipulate against liability for loss caused by fire, theft, delays arising from mobs, strikers, accidents and the like. The consideration for making such contracts is the lower rate of transportation charged. If a shipper requests and receives a certain service he should pay the rate scheduled for that service.

While it is true that the carrier may enter into a contract limiting his liability, it is equally well established that he can not relieve himself by special contract, or otherwise, from responsibility for loss or damage arising through fraud, misconduct, or negligence of himself or employees.

The carrier may require that claims for loss or damage must be presented for adjustment within a specified but reasonable time. He may also stipulate the amount for which he will be liable in case of loss, unless the customer gives the true value of the goods to be shipped, in which case he would have a right to make his charges accordingly.

§ 189. **Termination of liability.**—The liability of a common carrier as an insurer ends (a) when the goods are delivered to the consignee, or (b) if the consignee does not call for them within a reasonable time after receiving notice, or (c) upon their delivery to a connecting line, or (d) when the consignor exercises the right of *stoppage in transitu*.

(1) *Delivery.*—It is the duty of the carrier to deliver the goods unless prevented by the exceptions previously noted. The delivery must be made to the proper person and place in a reasonable time and manner. A wrong delivery through the mistake of the carrier or on a forged order, or through the fraud of others, and not as the result of negligence, fraud, or default of the owner, will cause the carrier to be liable for the value of the property. The delivery must be to the right person or his authorized agent.

The proper place for making the delivery depends upon usage and custom. Formerly, when freight was moved by teams it was the custom to deliver at the residence or place of business of the consignee. This is still the duty of express companies in cities. Freight shipped by railroad is delivered at the freight depot or warehouse.

The delivery must be made at a seasonable time. The consignee is not required to take the goods away on Sunday or a

Form of Order Bill of Lading

Form 606c. 250M Sets-10-08-K-28421.

Form 600c. 250M Set-10-08-R-28421.
For use in connection with the Standard form of Order Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908.



NEW YORK, NEW HAVEN & HARTFORD

Railway Company.

Shippers No. **238**

ORDER BILL OF LADING—ORIGINAL.

Agents No. _____

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading.

at September 14, 19

from J. A. WHITNEY & COMPANY, the property described below, in apparent good order, except as notes (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of the Original **ORDER** Bill of Lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

The Rate of Freight from.

to _____ is in Cents per 100 Lbs.

[illegible]

(Mail Address—Not for purposes of Delivery)

Consigned to ORDER OF J. A. Whitney & Co.

Destination, Huntsville State of Arkansas County of Madison

Notify L. Jeffries & Co.

At 64 Public Square, Huntsville, State of Arkansas County of Madison

Route, Your line. Car Initial Car No.

NO. PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
3	brls. New Orleans Molasses,	800#		
1	brl. Corn Syrup,	350#		
5	casks Coffee,	500#		
4	bags Coffee,	542#		
3	bcls. Wrapping Paper,	1281 ⁷ / ₂ #		
10	casks N. C. Baking Powder,	1105#		
15	brls. Stick Candy,	1604#		

If charges are to be prepaid, write or stamp here, "To Be Prepaid."

Received \$
to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per
(The Signature here acknowledged only the amount prepaid.)

Charges Advanced:

RECEIVED
SEP 14 1911
N.Y.N.H. & H.Ry. Co.

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received \$ _____
to apply in prepayment
of the charges on the
property described
hereon.

Agent or Cashier.

Per _____
(The Signature here acknowledges only the amount prepaid)

Charges Advanced:

J. A. WHITNEY & COMPANY, Shipper.

Agent.

Per *J. K. Calloway*

Per.

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

(2) *Notice to consignee.*—In a few of the states the carrier is not required to notify the consignee of the arrival of the goods, while in others this notification must be given. If the owner fails to call within a reasonable time after the receipt of a notice, the carrier's liability as an insurer ceases and he becomes liable as a warehouseman.

(3) *Delivery to connecting line.*—It frequently happens that

Form of Reverse Side of Order Bill of Lading

ENDORSEMENTS

J. A. WHITNEY & CO.,

By

W. C. Whitney

CONDITIONS

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights, or loss, damage or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary coopership and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for water convenience in handling or forwarding, and shall not be held responsible

for deviation or unavoidable delays in procuring such compression. Cotton in bulk consigned to a point where there is a railroad, public, or licensed elevator, cistern (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for any documents, speis, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other water; or from explosion, burning of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding or other accident for the purpose of saving life or property. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or over other barriers, and the liability for such lighterage shall be governed by the other sections of this instrument.

If the property is being carried under a tariff which provides that any carrier or carrier party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the provisions of the tariff, which shall be treated as incorporated into the conditions of this bill of lading.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

goods are sent to a certain place which requires forwarding them over several different lines. The first carrier delivers them to a second carrier, and he to another until they reach their point of destination. It is well to know that, if a carrier accepts goods to be shipped beyond the end of his line, his liability as an insurer ceases when the goods are safely delivered to the next connecting carrier. Of course the carrier may enter into an agreement to be liable until they reach the end of their journey, or such a liability may be implied if he has undertaken to transport them to their final destination; and to avoid liability the carrier must show a specific contract to carry only to his own terminus. In some of our states it is the rule that a carrier accepting goods to be carried beyond the end of his own line is liable for loss occurring upon connecting lines. If injury should occur on a connecting line and the first carrier is not liable under the statutes or by contract, then the shipper must look to the carrier causing the loss or damage. In order to determine when the damage occurred so as to know which carrier to hold responsible, the carrier in whose hands the goods are found damaged will be held to have caused the injury.

(4) *Stoppage in transitu*.—Whenever a vendor of goods exercises his right of stoppage in transitu, the carrier will be exonerated in making a delivery to the consignor. (See § 155.)

§ 190. **Carrier's lien**.—If the carrier has not been paid in advance he has a lien on the goods carried for his charges and for any money advanced to connecting lines, and he may retain possession of them until paid. After the goods are delivered, the right of lien ceases to exist. If a part of the goods has been delivered, the remaining portion may be retained until the amount of charges due has been paid. Under the common law the carrier had no right to sell the goods to satisfy his claims, but the statutes of most of the states have changed that rule and the right to sell after a reasonable time has elapsed now exists.

§ 191. **Bill of lading**.—The shipper should require a receipt from the carrier for goods delivered for transportation. This receipt, when issued by a railroad, is called a bill of lading. It is also a contract by the carrier to transport the goods and deliver them to a designated person or to his order. The contract part is governed by the same rules that apply to other contracts. A bill of lading is made in triplicate, that the railroad, the shipper, and the consignee may each have a copy.

Every bill of lading should embody the following terms: (1) the date of its issue, (2) the name of the consignor, (3) the name of the place where the goods were received, (4) the place whither they are to be shipped, (5) to whom they are to be de-

livered, (6) if the bill is to be negotiable in form, the words "order of" thereon immediately before the name of the person upon whose order the goods are to be delivered, (7) a description of the goods or of the package containing them, and (8) the signatures of both the shipper and the carrier.

Practically all of the railroad companies do business in more than one state, hence are under the jurisdiction of the Interstate Commerce Commission. This commission has made a ruling that bills of lading should be of a certain size and contain standard regulations. These regulations were determined upon by a joint committee of shippers and carriers appointed to formulate a suitable bill of lading. This ruling does not prohibit a shipper from preparing his own form, provided it complies with the requirements imposed by the commission.

There are two forms of bills of lading. The one is termed an "order" bill and possesses a certain degree of negotiability. The other form is a "straight" bill, non-negotiable, and is so stamped upon its face. The order bill of lading must be surrendered before the delivery of the property to the consignee.

QUESTIONS

How, if at all, can a common carrier limit its common law liability? What is the consideration?

When does a common carrier's liability terminate? What was the common law rule as to personal delivery? In what respect has the rule been altered? What is the rule governing express companies in making deliveries?

What right has a common carrier to require identification? Is he liable if the goods are delivered to the wrong person? What is the usual requirement? Will possession of goods obtained under a forged bill of lading avail against the holder of the true bill?

What are connecting carriers? When does a carrier's liability end when goods are delivered to a connecting carrier? Under what circumstances may this liability be changed? To which carrier must the shipper look for damages in case of a loss?

What is the carrier's lien for unpaid charges? When does this lien cease to exist? May the carrier sell the goods to pay charges incurred?

Is a bill of lading (a) a receipt? or (b) a contract? Does a contract require mutual assent to its terms? How is this mutual assent expressed in a bill of lading?

Mention the various requirements of a bill of lading.

CASE PROBLEMS

Case problem No. 132.—Baker shipped a box of books to himself. The railroad company gave him personal notice of their arrival, but Baker did not call for the books nor take them away, and they remained in the depot about sixty days, when they were stolen. The company used ordinary care to prevent loss by theft, but did not use all the means it might have resorted to. Is the company liable as a common carrier or as a warehouseman?

Case problem No. 133.—Allen shipped goods via the Illinois Central Railroad, from Bloomsburg, Illinois, to Columbus, Ohio. The freight was prepaid. The Illinois Central delivered the goods to the Terra Haute & Alton Railroad Company at Pana. They were spoiled in transit after the delivery at Pana. Allen sued the Illinois Railroad Company for the loss. Which company was liable, and why? (54 Illinois 88.)

Case problem No. 134.—Roe & Company, Boston, shipped a carload of dry-goods to Spencer Bros., Omaha. The freight was not prepaid and the railroad company refused to deliver the goods until Spencer Bros. paid the charges. Does the carrier have a right (a lien) on the goods for the charges?

CHAPTER XXXII.

PUBLIC CARRIERS OF PASSENGERS.

§ 192. **Who are public carriers**—A public carrier of passengers is one who undertakes, for a compensation, to carry all persons alike who may desire passage. He is bound to accept and carry only fit and proper persons and not those who are disorderly or who may have an infectious or contagious disease. The general principles of law governing common carriers of goods apply to public carriers of passengers, with this difference, however, the carriers of persons are under a more limited liability, they are not bailees of the passengers they carry. A person is not entirely under the control of the carrier; he can care for himself. The carrier of goods has unlimited control of them, and their safety depends upon the care he gives them. Common examples of carriers of passengers are railroads, street railways, steamboats, omnibuses, and like conveyances.

§ 193. **Who are passengers**—It is essential to know who are entitled to the rights and privileges of passengers. We learn that a passenger is a person entitled to travel in some established public conveyance. This includes those who travel on a pass or who have not yet paid their fare and have no designs of evading the payment, as well as those who have paid their fare. Those who through fraud or false representations ride without paying their fare are not considered passengers. The relation of carrier and passenger begins the moment one enters the premises of the carrier to take passage and continues until he leaves the conveyance and premises after arriving at the end of the journey.

During the World's Fair, at Jackson Park, in Chicago, the Illinois Central Railway Company operated local trains from the down town district to the fair grounds. Passengers were obliged to buy tickets, pass through turnstiles and deposit their tickets. The company erected a platform from which the passengers entered the cars through open doors in the side of the cars. There was an opening between the cars and the platform. A passenger in attempting to get on a train was pushed and crowded so that she fell into this opening and was injured. The passenger brought suit for damages, the railroad maintaining she was not a passenger at the time, and therefore not entitled to the care to which a passenger was entitled. It was held that: One who purchases a ticket and is in the place provided for passengers, and is waiting or is about to enter the carriage is a passenger, and the carrier owes a high degree of care to prevent such person being injured. (*Treat v. Illinois Central Ry. Co.*, 179 Ill. 576.)

A passenger is entitled to a seat and need not surrender his ticket until he is given one. But if no seat is to be had he can

not ride free. He must either pay his fare or leave the train at the first stopping place. He may then sue the carrier for a breach of contract.

Notes.—Public carriers of passengers are not obliged to carry passengers on freight trains unless they have by custom held themselves out as carriers thereon.

The carrier need not carry those who because of lack of physical ability may be likely to need more than ordinary care and attention, or are quite helpless.

Reasonable accommodations necessary for the comfort and welfare of the passengers must be provided. If the journey is of great length, opportunity to procure food must be offered.

§ 194. **Rights and liabilities.**—A public carrier of passengers has the right to demand the payment of fare in advance. He likewise may refuse to carry those who will not pay their fare or purchase a ticket. The fare charged must be reasonable. Most of the states regulate by statute the amount that may be charged. The carrier may make reasonable rules and regulations for conducting the business and for the comfort and protection of the passengers and their property. He may also require passengers to show their tickets before entering the train, to remain upon the car until it stops, and to keep off the platform. It would be an unreasonable requirement that every passenger keep his seat during the whole trip.

The liability of a carrier of passengers is not so extensive as that of a carrier of goods. Nevertheless, the carrier is still under a stringent and extreme responsibility for the safety of the persons carried. While he is not an insurer of their safety—a railroad ticket is not an insurance policy—he is liable for any injuries which could possibly have been avoided and must take precaution for protecting “life and limb,” and will be held liable for slight neglect. This liability includes the acts of the carrier’s servants, he being liable for any injuries they may inflict upon travelers. The carrier must also use diligence and care in protecting passengers from the violence of fellow travelers and strangers. If a passenger is injured through his own negligence, or where his negligence contributes to it, he can not recover damages from the carrier.

There is a reason. One is presumed to be able to take care of himself while on a journey. The carrier does not have the same control over a traveler as over goods—the passenger can not be stowed away like a box of freight or locked up in a safe like a valuable express package. And so the law appears to have a higher regard for the safety of goods in transit than the life or limb of a human being.

§ 195. **Baggage.**—The term *baggage* is generally held to mean the articles of necessity, comfort, or convenience, which a traveler takes with him on a journey for his personal use. It includes wearing apparel, money needed for traveling expenses,

jewelry intended to be worn, fishing tackle and appliances of those on a hunting or fishing trip, etc., but not merchandise or articles carried for business, trade, presents, or property belonging to other persons.

A conveyance of baggage is a necessity incident to the transportation of passengers. In consideration of the price paid for fare, the carrier is obliged to receive and carry a reasonable amount of baggage, as well as the passenger. And the carrier is liable for the protection as an insurer at common law against all loss or damage unless caused by the act of God, the public enemy, or the fault of the passenger. This liability does not extend to goods or baggage not delivered to the carrier and which the passenger keeps in his own control.

Telegraph and Telephone Companies.

§ 196. **Public servants.**—Telegraph and telephone companies are regarded as public servants and under public regulation and control. They must serve the public without discrimination and treat all customers alike. To this end they are obliged to receive, send, and deliver all lawful messages indifferently for anyone who may desire to employ them and pay the charges exacted, which must be reasonable. The same general rules governing telegraph companies also apply to telephone companies.

A telegraph company may refuse a message which on its face is indecent or is for some illegal purpose.

A telephone company may make reasonable regulations for the conduct of its business and deny the right to use its instruments to those who violate these rules.

§ 197. **Not common carriers.**—Such companies are not common carriers. The courts at first sought to hold them liable as such, but in the absence of statutory provisions imposing the liabilities of common carriers they are not so regarded. They are not bailees, nor do they insure the accuracy and prompt delivery of messages. They must use reasonable dispatch in forwarding messages, but are responsible only for negligence or wilful default in a failure to transmit correctly or to deliver. They must deliver the message within a reasonable time whether informed of their special importance or not. They may, for an extra charge, become insurers. They usually stipulate that unless the message is repeated, at the expense of the sender, they are exempt from liabilities, or at the most assume a very limited liability. The later rulings of the courts do not always hold this to be binding to the extent contemplated by the telegraph company.

It is unlawful for the company's employees to reveal the contents of a message to anyone except the one for whom it is intended.

QUESTIONS

What is a public carrier of passengers? What is the difference in liability of a carrier of persons and a common carrier of inanimate objects?

Name several public carriers of passengers. Who are passengers? Are the following passengers? (a) mail clerks? (b) express agents? (c) news agents? (d) an employee of the carrier?

Must one pay fare to be a passenger? What rights if any does a trespasser have? Is one who rides on a reduced fare through collusion with the conductor a passenger? When does the relation of passenger and carrier begin, and when end?

Is a passenger's ticket a contract? If not, what is it? Does a ticket entitle the passenger to a seat?

What are the rights and duties of a carrier of persons? What may the carrier do in regard to making rules? What would be (a) a reasonable rule? (b) an unreasonable rule?

What is the liability of the carrier as to the conduct (a) of the employees? (b) of fellow passengers?

Define baggage. What duty does the carrier assume toward baggage? What is the carrier's liability for baggage retained by the passenger?

To what extent is a telegraph company a common carrier? A telephone company? What duties does a telegraph company assume? Is it an insurer? Define negligence as to telegraph companies. May a telegraph company limit its liability? How?

CASE PROBLEMS

Case problem No. 135.—Plaintiff went to a railroad station to take a train which was due. The train was late, but he concluded to wait at the station. There were many people in and about the station at all hours of the day and night. While walking about the platform, and without his fault, the plaintiff was knocked down and injured by some men who were fighting. He had not purchased a ticket, but intended to pay fare on the train. The company might reasonably have anticipated that disturbances might sometimes occur about the station, but had made no provision for the protection of travelers. Is the company liable? (34 Conn. 554.)

Case problem No. 136.—Thurston was known as a bad man in general and a gambler in particular. His chief business was to fleece travelers whom he generally met in the smoking car. Having purchased a ticket over defendant's railroad the conductor prevented him from boarding the train. Thurston brought suit against the company. Result? (4 Dill. 321.)

Case problem No. 137.—One, Nevins, took passage on the steamboat Metropolis. In the trunk the passenger was carrying was certain jewelry, masonic regalia, and various engravings. The trunk was lost on the voyage. Nevins brought suit for the value of these articles. What is the liability of the carrier? (4 New York 225.)

CHAPTER XXXIII.

AGENCY.

THE RELATION OF PRINCIPAL AND AGENT IN GENERAL; HOW FORMED,
CONDUCTED, AND TERMINATED.

§ 198. **Introduction.**—The affairs of modern society are conducted on such an extensive, elaborate, and complicated scale that few business transactions can be accomplished entirely through the individual efforts of those interested. The magnitude and complexity of large enterprises and undertakings, as well as those of lesser consequence; and the necessity of performing many and various duties, often in different places and in remote countries, require that such services be rendered by representatives or agents. These conditions affect all classes from the ordinary business man to the largest corporation. In fact, it is only through agents that corporations can act. The application is universal.

§ 199. **Definition.**—An agent is one who is authorized to represent and act for another in business dealings with third parties.

Ewell's Evans' Agency recites: An agent is a person duly authorized to act on behalf of another, or one whose unauthorized act has been duly ratified.

Agency is a term signifying the legal relation existing between the parties, whereby the agent has authority, express or implied, from the principal to represent and transact any lawful business for the latter. The agent's power, as a general rule, is fixed and limited by such contract.

In law, whatever a person has the legal right to do personally, may be done by or through another—except those things which are purely personal in their character. Thus an agent can not vote for his principal nor enter into a marriage relation on his behalf. It is equally true, also, that what one can not lawfully do himself can not be done through another. Hence one can not appoint an agent to commit a crime, to further litigation, and other acts of a similar character. We therefore look upon an act done by one person in accordance with another's request as being done by the one who gave the order.

An agent is usually a person, but a firm or corporation may be the agent for another person, firm, or corporation. The agent is sometimes called an attorney, proxy, delegate, or representative. The one represented, usually called the principal, is sometimes designated as the employer, or constituent. The person,

firm, or corporation dealt with through the agent is known as the third party.

§ 200. **Agents and servants.**—A distinction is sometimes made, in law, between principal and agent, and master and servant. Both are forms of employment in which the agent, or servant, acts for some other person. The relation in either case is the result of an express or implied contract.

Under the head of principal and agent three parties are involved; the principal, the agent, and third parties. The agent is employed in a representative capacity to make contracts for his principal. He may be employed for some particular occasion or to perform some definite act, with more or less authority as to the time and manner of the performance, frequently but not necessarily receiving his compensation in the form of commission.

In the case of master and servant, but two parties are usually concerned, the master and the servant. A servant is employed for a definite period of time, at a fixed wage, to perform under the immediate direction and supervision of his employer—the master—some manual or mechanical service, skilled or unskilled, and without authority to bring his master into legal relations with third parties.

§ 201. **Classes of agents.**—Agents may be divided into two classes, general and special.

General agents.—A general agent is one who is authorized to transact all of his principal's business of a particular kind, or all of his business at a certain place. The general manager of a particular business is a general agent. The cashier of a bank is a general agent.

Special agents.—A special agent is appointed by his principal to do some specific act or acts, or transact a definite piece of business. The authority of a special agent is much less than that of a general agent and persons dealing with such agents are required to take notice of their authority.

§ 202. **Who may be a principal?**—Any person who is legally competent to act for himself may do through another the thing he, himself, might do. It follows, therefore, that one incompetent to make contracts is incapacitated from appointing others to represent him legally. The principal must have the same degree of competency that would be necessary if he wished to act in person.

§ 203. **Who may be an agent?**—Since the principal is held responsible for the lawful acts of his agents much latitude is permitted in the selection of those who may serve as agents.



Photo by Harris & Ewing, Washington, D. C.

EDWARD DOUGLASS WHITE,
LATE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT.

[over]

EDWARD DOUGLASS WHITE,

LATE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT.

Born in Parish of La Fourche, La., November 3, 1845. Died in Washington, D. C., May 19, 1921. Educated at Mt. St. Mary's College, Emmitsburg, Md., Jesuit College, New Orleans, and Georgetown College, Georgetown, D. C. He was admitted to Louisiana bar in 1868 and at once began practice in New Orleans. In 1874 was elected member of the Louisiana Senate, and in 1878 Associate Justice of the Supreme Court of Louisiana. He held this office until 1891, at which time a new Constitution was adopted, which created a new court. He was then elected United States Senator. February 19, 1894, he was appointed Associate Justice of the Supreme Court of the United States. December 12, 1910, was appointed Chief Justice of the Supreme Court of the United States.

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Hence, it follows that ordinarily anyone may be an agent, except an imbecile or a very young child. An agent must act in good faith, and for the benefit of the one he represents. He can not be an agent in the same transaction for two parties having adverse interests; he can not serve two masters.

Thompkins, a boy sixteen years old, was employed by Carter, who was of legal age and competent to contract, to buy from Bancroft five hundred bushels of corn. While Thompkins was incapable of making a contract for himself he was competent to act as an agent and to bind Carter for the price of the corn purchased.

Thompkins was employed by Carter to buy five hundred bushels of corn. He was also employed by Bancroft to sell Bancroft's entire crop of corn. Thompkins could not act as the agent of both parties except with their knowledge and consent.

§ 204. **How formed.**—There are four methods by which an agency may be created:

First. By appointment;

Second. By implication;

Third. By ratification;

Fourth. By necessity.

(1) *By appointment.*—No particular form of words is necessary for the appointment of an agent; any words that convey the wish of the principal are sufficient. The appointment may be by word of mouth, or by written authority. If in writing it may be very informal, as a telegram or a letter of instructions, or it may be in a formal writing under seal, or otherwise. If the appointment is for more than one year, then under the Statute of Frauds, the agreement must be in writing in order to be enforceable. Or, if the authority is for the purpose of transferring title to land, or executing an instrument under seal, the authority must be conferred in like manner.

Under an oral agreement made in October, 1882, Meyers employed Roberts to manage the former's plantation for the remainder of that year and for the year 1883, provided neither party canceled the contract on January 1st. Roberts entered upon the work and continued as manager until May 1st, when Meyers discharged him without cause, paying for services rendered to that date. Roberts brought suit for damages for unpaid salary for the remainder of the year. Meyers plead the Statute of Frauds, contending the contract was unenforceable because it was not to be performed within one year's time. It was held that Roberts could not recover for the unexpired term of his contract. The court said: "A contract for personal services to continue for a longer period than one year is plainly within the statute. Thus, if at Christmas I orally hire a servant for one year, to begin New Year's Day, I am not legally bound to receive him into my services when he presents himself; and if I do receive him, I may discharge him afterwards without incurring any other liability than payment of his wages due for the time actually served."

The formal written document appointing an agent is called a power of attorney. It is not necessary to have a power of attorney acknowledged unless it is to be recorded. The following is a form of a power of attorney for the purpose of signing, indorsing, and accepting negotiable instruments.

Power of Attorney.

KNOW ALL MEN BY THESE PRESENTS, That I, Peter Sterling, of the city of Chicago, county of Cook, and state of Illinois, have made, constituted, and appointed, and by these presents do make, constitute and appoint John Hancock of the city of Chicago, county of Cook, and state of Illinois, my true and lawful attorney, for me and in my name, place and stead.

1. To draw checks against my account in the City National Bank.

2. To indorse notes, checks, drafts or bills of exchange which may require my indorsement for deposit as cash or for collection in the said bank.

3. To accept all drafts or bills of exchange which may be drawn upon me, and to do all lawful acts requisite and necessary to be done for effecting these premises, as fully, to all intents and purposes as I might or could do if personally present at the doing thereof; hereby ratifying and confirming all that the said attorney shall lawfully do or cause to be done by virtue hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this tenth day of January, in the year of our Lord one thousand nine hundred and twenty-one.

(Signed) PETER STERLING [Seal]

Signed, sealed and delivered

in the presence of

ANDREW JACKSON. [Seal]

(2) *By implication.*—The appointment of an agent may sometimes be implied from the acts and conduct of the parties. If a supposed principal, knowingly and without dissent, permits another person to act as his agent; or, if by his actions he has led others to assume with reason that such person is his agent, he will be held liable to third parties who have relied upon the apparent authority of the agent. Another form of agency by implication is in the case of partners who are considered the general agents for each other in all the affairs of the partnership.

A son had for years been in the habit of signing his father's name to notes, and with the knowledge of the father, who made no effort to stop it. The father was held liable for the payment of the notes.

(3) *By ratification.*—When a person assumes to act as the agent of another, without real or apparent authority, or when one who is really an agent has exceeded his authority, he does not bind the person for whom he assumes to act, unless the

supposed principal subsequently acquiesces in or receives the benefits of such acts. Such approval is known as ratification.

Some of the incidents common to ratification are:

(a) The unauthorized act must have been transacted in the principal's name.

(b) The one assuming to act must do so as an agent.

(c) The principal must be ascertainable, and competent to contract.

(d) The entire act (or no part of it) must be ratified by the principal, with knowledge of the facts.

(e) A valid ratification once made can not be withdrawn.

(f) If the principal refuses to ratify, the agent will be liable to third parties for any damages sustained.

(g) The person who assumes to act in the name of another impliedly warrants that he has such authority.

(h) Illegal acts can not be ratified.

(4) *By necessity.*—In a few instances an agency may be created by necessity. A husband is bound to support his wife and minor children. If the husband does not provide his wife with necessaries, the law gives her the implied authority to pledge his credit, even against his will. If she was amply provided for, then the one selling the goods would do so at his peril. This is also true where the father has wrongfully neglected to provide for his minor children. Another illustration is that of a ship's master, who has the authority to make contracts, binding the owner, pledging his credit, in case of necessity, to purchase supplies or make repairs, while in a foreign port.

§ 205. **Duties and liabilities of agents to principal.**—The agent, being the representative of his principal, is under obligations to perform the duties incident to such a relationship. Failure to do so renders the agent personally liable to his principal. The chief duties an agent owes to his principal are:

(1) *Loyalty.*—The first duty every agent owes to his principal is that of loyalty. He can not represent his principal and another party, secretly, in the same transaction. All the efforts of the agent must be for the benefit of the principal. The profits made by the agent in the exercise of his duties belong to the employer.

A clerk, who had access to his employer's books, knew that he was negotiating for the renewal of a lease which was about to expire. By reason of this information the clerk secretly obtained a lease of the premises for himself and another person through misrepresentations made to the landlord. The court compelled the clerk and this fellow conspirator to surrender the lease to the first lessee. (59 Cal. 119.)

An employee was offered a bonus, in excess of the regular price of the goods sold, if he would see that they were delivered in advance of the regular delivery. The money thus paid was required by the court to be turned over to the employer. (15 Ill. App. 507.)

(2) *Obedience*.—The next duty of the agent is to obey the instructions of his principal, if they are reasonable and lawful. If he disregards his instructions and losses ensue, the agent will be personally liable for the damage. An agent is not bound to obey instructions to do an illegal or immoral act, such as smuggling goods or selling libelous books.

If an agent is instructed to ship goods at a certain time over a designated route, and he ships at some other time over a different route, and a loss results, the agent will be held liable. So, also, if he is told to insure the goods and fails to do so, the risk is the agent's risk. (88 Am. Dec. 416.)

(3) *Skill, care, and diligence*.—An agent is under obligations to exercise that degree of skill, care, and diligence in the affairs of his principal that a reasonably prudent man would use in his own business. A failure to do so makes the agent liable for any damages sustained.

Physicians, and others who hold themselves out to the public as possessing skill and special attainments in their professional capacity, will be held responsible for the skillful application of their qualifications to those who employ them.

(4) *Accounting*.—It is the duty of agents to keep accounts of all pecuniary transactions relating to the agency, so that they can account to their principals for all money and property that may come into their possession. The money should be deposited in a bank in the name of the principal. If deposited in the name of the agent and the bank fails, the loss will fall on the agent. When the agent has collected money belonging to the principal, he should promptly notify him; and if intrusted with goods for sale, he should account for the proceeds within a reasonable time.

(5) *Information*.—It is the further duty of the agent to keep his principal informed. He must give seasonable notice of such information as may be advantageous either in promoting the prosperity of the agency or in protecting his principal's interest from loss.

(6) *Mixing property*.—It is the duty of the agent to keep his property and that of his principal separate, so that they may be distinguished. If the agent does so mix the property of both of them that they can not be separated, then the entire property will belong to the principal.

§ 206. *Liabilities of agents to third parties*.—Whenever an agent acts within the scope of his authority, he binds his principal upon the contract formed and no liability attaches to the agent. However, an agent may, in several ways, become personally liable. Thus:

(1) When one assumes to act as agent for another without authority, or if authorized to act, but exceeds, or materially departs from his authority, he will become personally liable to the person with whom he is dealing.

(2) If the agent conceals the fact of his agency and treats with the third party as though he were the principal, he becomes liable to the same extent as though he were actually the principal.

(3) If a contract is made in the name of a fictitious principal or of a person not legally responsible, the agent makes himself individually liable for the contract, unless the facts are known to the third party.

(4) An agent binds himself, and not his alleged principal, if he fraudulently or falsely represents himself as an agent.

(5) The agent is liable for any tort, or wrongdoing, committed by him while serving his principal, whether done through his own disobedience, carelessness, or malice, or by order of his principal.

(6) An agent may make himself personally liable to third parties by an express agreement to become responsible.

§ 207. **Duties of principal to agent.**—The principal is liable to an agent in the exercise of his agency for the following obligations:

(1) *Compensation.*—The agent is entitled to compensation for his services, either in salary or commission, as may be agreed upon; or in the absence of an agreement, then according to the usage of trade at the place where the business was transacted, unless it were agreed that the agency was a gratuitous one.

An agent is not entitled to compensation for consciously doing an illegal or immoral act, although he may have been so directed by his principal.

If the agent is employed for a definite period and is wrongfully discharged before the termination of the agency he will be entitled to compensation for the damages thus sustained, as in the case of any other breach of contract. But it is the duty of the agent wrongfully discharged to make a reasonable effort to secure other employment so as to reduce the amount of damages caused by reason of the discharge. It is also true that, if the agent abandons the agency before the agreed time, he will likewise be liable to the principal for any damage caused by his breach of the contract.

(2) *Reimbursement.*—It is the duty of the principal to reimburse the agent for all legitimate expenses and disbursements, necessarily incurred by him in the lawful discharge of the agency for the benefit of the principal.

The agent's outlay must not be for an illegal purpose, nor can he recover for unnecessary expenses incurred by his own fault or negligence. An agent appointed to make a transfer of title of property caused it to be made to the wrong person. It was held he could not recover money paid as expenses to secure a correction of the mistake consequent upon his blunders. (48 N. J. Eq. 411.)

(3) *Indemnification*.—Every agent is entitled to be indemnified by his principal for any losses or damages he may sustain in doing any authorized lawful act done in the execution of his authority. The loss or damage must proceed directly from the execution of the authority. An agent robbed of his own money while on a journey for his principal would have no lawful claim for indemnity.

An agent acting under directions from his principal entered upon the lands of another by mistake and cut timber, the principal receiving the proceeds. The principal had to indemnify the agent for the damages he was obliged to pay for the trespass. (39 Me. 347.)

But the principal need not indemnify the agent for destroying the property of another without lawful excuse, even though he was directed to do so by the principal. The law does not encourage lawbreakers.

(4) *Agent's lien*.—A lien is the right of retaining the property of another until the claim of the person in possession is satisfied. This right does not vest the title in the holder, but is merely a right of detention. An agent is entitled to a lien for the protection of his right to compensation, reimbursement, and indemnification.

Duties and Liabilities of Principal to Third Parties.

§ 208. **General rule**.—The principal is as liable to third parties for the authorized lawful acts and contracts done or made by the agent as if the business had been personally transacted by the principal. He is also liable for any unauthorized acts or contracts, if subsequently ratified. The principal is not bound by a performance made outside of delegated authority. It is therefore the duty of third parties, dealing with agents, to ascertain their authority; otherwise they will deal with them at their peril.

§ 209. **Wrongful acts**.—The principal is liable to third parties for the wrongful acts (torts) of the agent, if authorized or subsequently ratified. He is likewise liable for the agent's negligence or carelessness within the scope of his employment, and sometimes for his wilful and malicious acts.

§ 210. **Statements and representations**.—Statements or representations by the agent, made in the course of the agency and within the scope of his authority, are as binding on the principal as though made by him. This is true regardless of whether the statements or representations be true, or false and fraudulent.

§ 211. **Notice to the agent**.—Notice to the agent, with reference to matters over which the authority of the agent extends, is deemed notice to the principal.

§ 212. **How terminated.**—The various ways in which the authority of an agent may be terminated are:

First. By agreement;

Second. By acts of the parties;

Third. By operation of law.

(1) *By agreement.*—The relation of principal and agent being founded upon mutual consent, it may be dissolved at any time by the agreement of the parties. If the agent has been employed for a specified period of time or for a particular transaction, the expiration of the time limit or the accomplishment of the proposed object terminates the agency.

(2) *Act of the parties.*—It is a general rule that the agent's authority may be revoked at the pleasure of the principal. Where the authority was granted for a valuable consideration or the agency is "coupled with an interest," this right does not exist. If the principal revokes the authority contrary to his previous express or implied contract he may subject himself to a claim for damages suffered by the agent.

"*Coupled with an interest*" has reference to any interest the agent may have in the subject-matter of the agency other than merely the compensation to be received in the form of commission or otherwise, in the performance of his duties. Thus, where the agent is given authority to collect a debt and to reimburse himself for money advanced the principal, the agent's rights are said to be coupled with an interest.

If either party refuses to carry out his part of the contract, such default will end the agency and the injured party may recover damages sustained for such failure. If the agency is a gratuitous one, then its termination at the will of either party would end the relation without liability for damages.

The employment may ordinarily be terminated at will by either party upon notifying the other, if the duration of the employment was for no previously fixed time. In such a case the agent may recover pay for services rendered.

The principal may discharge the agent at any time without incurring liability, if the agent becomes incompetent, disobedient, disloyal, or is guilty of misconduct.

(3) *Operation of law.*—The general ways in which the relation of principal and agent may be terminated by operation of law are: (a) death, (b) insanity, (c) bankruptcy, and (d) war.

(a) *Death.*—The authority of the agent terminates at once by the death of the principal—unless the power was coupled with an interest. The agent's authority ceases immediately although his term of employment may not have expired, nor can he have redress for the termination of his authority. Contracts made by the agent with third parties, in ignorance of the principal's death are not enforceable, but are void.

(b) *Insanity*.—Unless the authority be coupled with an interest, the insanity of either the principal or agent terminates or suspends the agent's authority. If the principal has not been judicially declared insane third parties dealing with the agent in good faith will be protected.

(c) *Bankruptcy*.—The bankruptcy of the principal revokes the agent's authority—unless coupled with an interest. In the event of the bankruptcy of the principal his property passes from under his control and with it the subject-matter of the agency. Upon the bankruptcy of the agent, his authority is revoked except where it is for the doing of some merely formal act, as the execution of a deed.

(d) *War*.—The breaking out of war between the country of the principal and that of the agent, if they are of different countries, dissolves—or at least suspends—the relation during hostilities.

QUESTIONS

Explain briefly the general application of Agency to the transaction of business. How do corporations conduct business?

Define agent. What does the term Agency signify? How is an agent's power fixed? What may an agent do? May one legally appoint another to vote for him at a public election? To assault another? May a firm or corporation be the agent for another person, firm, or corporation? Illustrate. By what other names may an agent be known? Who is the principal? By what other term may the principal be designated? What is meant by the **third party**?

Consult a reference book for the meaning of: (1) delegate, (2) factor, (3) trustee, (4) committee, (5) broker, (6) attorney, (7) servant, (8) auctioneer, (9) envoy, (10) employee.

What is the distinction between principal and agent, and between master and servant? In what respect are they similar? What is the general nature of their duties that makes one an agent and another a servant? Is a salesman an agent? Would the general manager of a street railway company, employed by the year at a fixed salary and devoting his entire services to the company, be a servant or an agent? Name several classes of servants; agents. Why is it of importance in law to make a distinction?

What is a general agent? Mention several general agents. Give an example of a special agent. Richardson employed Cooper to manage his elevator. Is Cooper a general or special agent?

Who may be a principal? What degree of competency must the principal possess? May an infant appoint an agent? Would such appointment be void or voidable? May an insane person appoint an agent? How are the affairs of insane persons managed? Who appoints them?

May one who is not competent to contract for himself act as the agent of another? Who may be an agent? Explain why it takes less legal capacity to be an agent than to be a principal. Can one be an agent for two adverse parties in the same transaction?

State the various ways in which an agency is created. When must an agent's authority be conferred in writing? When must the appointment be in writing? What is a power of attorney? Draw up a power of attorney in which your teacher authorizes you to act as his agent in the sale of a typewriter.

Explain and illustrate an appointment by implication.

What does the word **ratification** mean? Illustrate various ways in which one may be an agent by ratification. Name some of the incidents common to ratification.

What is an agent by necessity? Mention several illustrations. What is the chief duty an agent owes to his principal? May an agent authorized to sell property buy it for himself?

What is an agent's liability for refusing to follow instructions? When would he be excused from doing so?

Discuss the agent's obligations in regard to exercising skill, care, and diligence. Must he keep accounts? Give information? What is the result if he mixes his own property with that of the principal?

It is said an agent incurs no personal liability. Mention the several exceptions to this rule. Discuss the rights of an agent to compensation, reimbursement, and indemnification in the performance of his duties. What are the obligations of the principal to third parties?

When may the principal revoke an agent's authority? Make a topical outline of the various ways in which an agency may be terminated.

What is meant by "Coupled with an interest?" Illustrate. What is the rule in regard to the termination of an agency when it is coupled with an interest?

Write a brief summary of the (a) advantages; and (b) disadvantages of transacting business through agents.

CASE PROBLEMS

Case problem No. 138.—Principal appointed Henderson, a boy seventeen years old, to act as his agent in selling a team of horses. Henderson entered into a contract with Lumpkin for the purchase of the horses. When the horses were to be delivered the next day, Lumpkin refused to receive and pay for them and set up as a defense that Henderson was a minor. Is that a good defense?

Case problem No. 139.—Kent, an attorney at law, has two clients whose interests conflict. He believes that he can do strict justice to both of them. What is he legally obliged to do?

Case problem No. 140.—Traves authorized a real estate agent to purchase a certain house and lot for him for \$5,000.00. The agent bought the property for \$4,250.00, and then sold it to his principal for \$5,000.00. Afterwards Traves was informed of the facts in the case. Did he have any remedy against the agent? (109 Ill. 39.)

Case problem No. 141.—A fireman in a printing plant was authorized to purchase coal. The fireman let the contract to the Acme Coal Co., the lowest bidder. The coal company had previously and secretly agreed to give the fireman a commission of 20 cents a ton for all coal bought. What right, if any, does the fireman have to this commission?

Case problem No. 142.—Graves appointed Welch, his agent, to rent his house, but instructed the agent to make no repairs. The house was badly in need of repairs. Welch secured a tenant and agreed to have the house repaired. Who is liable for the cost?

Case problem No. 143.—Welch deposited the money he collected for his principal in a bank along with his own funds. The bank failed. Who must bear the loss? Explain how the money should have been deposited.

Case problem No. 144.—The guardian of a minor purchased an undeveloped mine, with money belonging to his ward. The guardian took title in his own name, but intended to account to the ward for the money thus used. On arriving at his majority the young man refused to accept the money and interest, but claimed the mine as his property. Explain to whom the mine belongs. If the mine had been a failure, what would your answer be?

Case problem No. 145.—Defendant employed Doe to do some carpenter work, and, while thus engaged, Doe, seeing the plaintiff approach, hurled his hammer at him and severely injured him. Is defendant liable? What is the duty of third parties in dealing with agents?

CHAPTER XXXIV.

MASTER AND SERVANT: OR EMPLOYER AND EMPLOYEE.

§ 213. **Master and servant.**—The relationship existing between the employer and employee, or the more precise and technical terms, master and servant, is created by contract, express or implied, and exists when one person or firm hires the labor of another for a definite time.

The one who employs the labor of another is called the master, and the one so employed is the servant. The word servant embraces all persons who are in the employ and subject to the control and direction of another.

A vice principal is one who is in the employ of the master, but with authority of superintendence, control, or command of other persons employed in the same service.

A fellow-servant is one engaged with others in the same service, in the same grade of employment and for the same master.

§ 214. **Duties of the master.**—The liability of the master for injuries done servants and third parties is a fruitful source of litigation. At the outset let us understand that the master is no an insurer of the life and limb of the servant; that he is not bound to indemnify the servant against injuries happening in the course of his employment; and that the employee assumes the ordinary risks incident to his occupation, unless there are laws to the contrary. A person is not bound to enter a particular service, but if he does accept such employment he must take things as he finds them. Nevertheless, it is still the duty of the master to exercise reasonable care in protecting his servants or employees from needless danger, and a failure to do so will cause him to be liable for any resulting damages. Some of the important duties the master owes to the servant will be considered below.

(1) The master must provide a reasonably suitable and safe place for his workmen while at work. If the place is unsafe because of the nature of the occupation and not through the want of proper precautions having been taken to make it safe, then the employer is not liable.

A powder mill is obviously not so safe a place in which to work as is a flour mill. But if dangerous explosives were stored in the flour mill, unknown to the employee, and he should be injured by an explosion, the master would be liable.

(2) It is the duty of the master to furnish the proper tools, machinery, and appliances of the business for his workmen.

They need not be the best tools and machinery obtainable, nor be of the latest improved pattern, but they must be reasonably safe and be adapted to the purpose for which intended.

Many of the states have enacted laws requiring that safety devices and appliances be placed on machines wherever possible in order to afford protection to those who must use them. Railroads were required some years ago to equip their cars with a car coupler, which reduced the danger of injury to brakemen to a minimum.

(3) It is also the duty of the master to employ persons who are competent or fit for the work which they are employed to do. He has no right to jeopardize the lives of others by placing incompetent or inexperienced persons in charge of dangerous machinery.

(4) The master must also give special instructions to servants in exceptional situations. Young or inexperienced persons must be informed regarding the use of dangerous machines and be warned of the hazard in the carelessness of their use.

Plaintiff, a carpenter, was employed by defendant to go upon a submerged lot in a boat to do certain work. The possession of the lot was in dispute, and with a threatened resort to arms. This was known to the defendant, but unknown to the plaintiff who, in ignorance of the danger to which he was exposed, entered upon the property, was fired at from an adjacent lot and injured. The withholding of the information from the plaintiff of the risk he incurred caused the defendant to fail in his duty. He was bound to communicate the information to his servant, who was entitled to such information on the subject as the master may possess. The employer was, therefore, liable in consequence of the injury done. (44 Cal. 187.)

§ 215. **Master's liability.**—The master is liable for the acts of servants, civilly or criminally in the course of the master's business, which cause injury to third persons. This rule has also been held to apply where the employee wilfully and maliciously causes injury to another. This is especially true where a passenger has been injured by an employee of a public carrier. Carriers of passengers are held to a high degree of responsibility for the acts of their servants.

The servant is liable, as well as the employer, for any injury done wrongfully or negligently. If the act is of such a character as to impose a criminal liability, that penalty may be assessed in addition to pecuniary damages.

Smith was employed by Brown as a servant. Brown sent Smith on an errand to a neighboring village. After the errand was finished Smith drove to another town on personal business of his own, and while doing so negligently drove the horse so as to cause injury to King. Brown was not held liable for the injury. Why? (71 Me. 432.)

B was employed by defendant as a farmhand. A cow broke into defendant's field, and in driving the cow out of the field B killed her with a stone. Defendant was held responsible. (153 Md. 245.)

A passenger on a street car censured a conductor for abusing a boy for trying to steal a ride on the car. The conductor then maliciously assaulted the passenger. The company was held liable for the misconduct of the conductor. (43 Am. Rep. 185.)

§ 216. **Fellow-servant rule.**—As before stated, the servant as-

sumes the risk incident to the nature of his occupation. This applies in a great measure to injuries resulting from the careless or wrongful acts of co-servants. The employer at common law can not be held liable for an injury received by one servant on account of the negligence of his fellow-servant, there being no fault on the part of the employer, but he would be liable if the injury was caused by a vice-principal. A servant of a railroad company is not entitled to the same remedy for injuries as a passenger. If the master works by the side of the servant, that fact would not exempt the master for any injury he might cause as a fellow-servant: he is as answerable as he would be to a stranger

§ 217. **Contributory negligence.**—The master is not liable to the servant for an injury due to the latter's own contributory negligence. The indirect cause of the injury might be due to the negligence of the master or someone acting for him; but if the injured servant contributed directly to the cause by his own fault or negligence, then he can not recover for any damages that may result. Everyone is bound to use reasonable care to protect himself from injury.

§ 218. **How discharged.**—The servant may be discharged for any one of the following causes:

(1) Wilful disobedience of any reasonable and lawful order.

If the servant refuses to obey the reasonable orders of the master, even though they may seem severe and hard, it is good grounds for dismissal from service for insubordination. In every contract of hiring it is implied on the part of the servant that he will obey the lawful and reasonable commands of his employer. If the order is for the doing of some unlawful act, or is not within the scope of his employment, or would expose him to dangers not incident to the business, the employee may refuse to obey without making himself liable to dismissal upon legal grounds.

Plaintiff was employed as a teller in a bank, where he was in the habit of remaining after banking hours. The bank had iron shutters, used to guard the windows, and which the teller left open nights. Upon being remonstrated with by the cashier the teller replied he would leave them open whenever he wished. The cashier closed the shutters at the close of the banking day, but found on the next day that the teller had again left them open, and upon again being remonstrated with said he would open them just when he pleased. This was held to constitute a sufficient cause for dismissing the teller from service, although he had a contract of employment for a term. (1 T. & C. (N. Y.) 361.)

(2) Gross moral misconduct.

If a servant defrauds his master, or aids others in doing so; if he reveals his master's trade secrets, spread defamatory reports disclosing family secrets in disregard of the obligation to protect his master's interests, he will afford good and sufficient cause for a discharge therefor. Serious illness on the part of the servant absolves the master from the contract. Both of them are released from their mutual obligations.

(3) Incompetency of permanent disability.

If a person contracts to labor for another there is an implied contract that he possesses the requisite skill, experience, and knowledge to discharge his duties,

and the employer would not be compelled to retain him for the time hired or pay damages for discharging him if he were unable to perform the particular services for which he was employed.

(4) Habitual neglect in performance of duties.

Generally a single act of negligence will not be sufficient ground upon which to discharge a servant. The negligence must be habitual rather than occasional.

Workmen's Compensation Laws.

§ 219. **Employer's liability.**—The common-law principles governing the relations of employer and employee have been very largely abandoned in a majority of the states by the enactment of statutes under the title of Workmen's Compensation Laws. These laws provide for compensation to injured workmen in the case of industrial accidents, and are designed to include all accidents which may be properly classified as occupational injuries and none other. The employments covered include transportation, construction, and manufacturing, and exclude agriculture, domestic service, and occupations not conducted for pecuniary gain. The essential features of these laws are:

(1) The indemnity for injuries is payable without regard to fault, unless the accident is due to the wilful negligence of the employee.

(2) The amount of the indemnity is based directly upon the workman's earning capacity according to a given schedule. The test of the right of indemnity is, did the accident arise "out of and in the course of employment."

The plan in brief may well be described as simply accident and life insurance for workmen while on duty, the employer being required to pay compensation to his injured workmen and their dependents. In those states where a workmen's compensation law is not in force an injured workman's remedy is an action at law in which he must show that the injury was caused by the negligence of the employer. To such an action the employer has the following four chief defenses:

First. That the accident was not caused by the employer's negligence.

Second. Contributory negligence, that is, the negligence of the employee, directly contributed to the cause of the accident.

Third. Assumption of risk, that is, that the employee voluntarily assumed the risk, the hazard being presumably taken into account in fixing the wages.

Fourth. Fellow-servant doctrine, that is, that the accident was due to the negligence of a fellow employee, which, at common law, is one of the assumed risks.

The master is not absolved from responsibility by the fact that a servant driving his master's car upon the master's business, permits a stranger riding with him to drive it temporarily, while upon such business. (51 L. R. A. 970.)

QUESTIONS

How does the relationship existing between master and servant arise?

What other term may be used rather than master and servant? Define master; servant; vice principal; fellow-servant; superintendent.

Is the master the insurer of the life and limb of those who enter his employment? What risks do employees assume? Specify the various duties incumbent on the master in protecting his employees from danger.

What is the liability of the master for the acts of his servants, which result in an injury to third persons? Is the master liable for criminal acts of his servants? Is the servant also likewise liable?

What is meant by contributory negligence?

What is meant by fellow-servant rule? Why do employers need foremen and superintendents?

Name the various ways in which a servant may be discharged.

What are the essential features of Workmen's Compensation Laws?

In what respect do they change the common law principles of master and servant? Has this law been adopted in your state? What is meant by labor law?

CASE PROBLEMS

Case problem No. 146.—Adams employed Black to work for three weeks in the former's garden. Was Black an agent or a servant? What would your answer be if Adams had employed Black to deliver a parcel?

Case problem No. 147.—Defendant agreed to make a suit of clothes for the plaintiff for a certain sum of money, part of which was to be paid in cash, and the remainder in the future. The plaintiff made the cash payment and demanded the clothes, but the defendant refused to deliver them without the payment of more money, and also refused to return the money previously paid. The plaintiff had the tailor arrested for embezzlement on the theory that he was a servant of the plaintiff. Was the tailor an agent or a servant of the customer? When the plaintiff paid this money to the tailor, to whom did it belong?

Case problem No. 148.—A brakeman employed on a freight train has used a defective grab-iron on the caboose of the train on which he has been braking at least five times daily for three weeks. During all this time he knew the grab-iron was defective, but failed to notify the proper authorities of its defect. To what extent would the Company be liable if he received an injury on account of this defect?

Case problem No. 149.—While a train is standing at the depot waiting time for departure, the engineer blows the whistle as a joke in an effort to scare a nearby horse which Jones is riding. The horse runs away and Jones is injured. Is the railway company liable to Jones for damages? Is the engineer? (17 W. N. C. 227.)

Case problem No. 150.—Peter Sterling owned an automobile, and employed Booth as a chauffeur. On a certain occasion Booth requested the use of the machine to go on an errand for himself. The permission was given. During the course of the trip he injured a pedestrian, the plaintiff. The plaintiff brought a suit against Peter Sterling, the owner of the automobile, for damages. Result?

Case problem No. 151.—Adams and Black were employed by the Western R. R. Co., the former as an engineer and the latter as fireman of engine. Through the negligence of Adams a collision occurred in which Black was injured. Can Black maintain an action against the railway company for damages?

Case problem No. 152.—Adams was employed for a week as a stationary engineer in a large manufacturing plant. Nothing was mentioned in his contract in regard to the use of alcoholic liquors. After he had been employed, the company made a rule that all employees must abstain from the use of such liquors. Adams was threatened with discharge unless he quit drinking beer. Being a moderate drinker, he refused to quit and was discharged. He thereupon sued on his contract. Result?

CHAPTER XXXV.

PARTNERSHIP.

Introductory Comments.

§ 220. **Purpose of forming a partnership.**—The chief object in forming a partnership is for the mutual advantage and benefit of all concerned. Oftentimes it is more profitable, economical, and practical for several persons to unite capital, labor, or experience for their common good than to conduct enterprises in their several individual capacities.

In a partnership combination it is possible that the beneficial advantages may be secured through some one or all of the following conditions:

First. Lessening or eliminating competition.

Second. Enlarging the capacity of the business by concentrating or increasing the capital.

Third. Combining widely differing knowledge, experience, and ability with wealth.

Fourth. Co-operation and division of labor.

And, while the foregoing are some of the many advantages resulting from partnership combinations, it must also be remembered that there are disadvantages, as will be apparent from a study of the law governing the subject. Indeed, such a relationship should never be undertaken, except with persons of known honesty, integrity, and fidelity.

The subject of partnership will be considered under the following main divisions:

First. Formation of and incidents common to partnerships.

Second. Operation and principles underlying their existence.

Third. Dissolution and its effects.

Formation of and Incidents Common to Partnerships.

§ 221. **Definition.**—A partnership is an association—not incorporated—of competent persons who have united their money, property, or skill, as principals, for the purpose of carrying on some lawful business or enterprise, for their joint profit.

Other definitions.—Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profit between them. (New York Code of Civil Procedure.)

A partnership is an association of two or more persons to carry on as co-owners a business for profit. (Uniform Partnership Act.)

The association must be for the purpose of carrying on some business together for profit. An arrangement for a pleasure trip or a ladies' club, a labor union, or to maintain a fire company for

the public benefit is not considered a partnership—although there is a liability on the part of the members for debts contracted in their behalf.

The persons forming a partnership are referred to collectively as a firm, a house, or a company. Individually they are known as partners, or co-partners.

In a partnership the act of one partner is the act of each of the other partners; each partner is an agent of the firm for the purpose of the business of the partnership; and each partner is jointly and individually liable for all the debts of the firm.

In some states if a partner misappropriates partnership funds, or absconds, it is no crime, and the other partner has no redress, neither can the defaulting partner be punished, even though he may thereby financially ruin the firm and the other partner or partners.

§ 222. **Who may be a partner?**—While any number of persons may become partners, only those capable of making a valid contract on their own account may enter into a partnership relation.

§ 223. **Partnerships classified.**—Partnerships may be classified as:

- (1) Ordinary, or common law.
- (2) Limited.
- (3) Joint stock company.

(a) *An ordinary or common-law partnership* is one in which the partners have united their money, property, or service for carrying on some general line of trade or business or some one branch of trade or business. A partnership may be formed for the purpose of conducting a single transaction or adventure as well as a series of transactions.

(b) *A limited partnership* is one in which the liability of some of the partners is limited for partnership obligations to the amount of their investment. They are formed in accordance with statute law of the different states. (See § 244.)

(c) *A joint stock company* is formed under authority of statutory law. The investments of the members are represented by transferable shares. There are other distinctions that will be considered under this topic later. (See § 245.)

§ 224. **The various kinds of partners.**—Partners may ordinarily be classified as follows: (1) ostensible, (2) nominal, (3) secret, (4) silent, and (5) dormant.

(a) *Ostensible partners* are those who are held out to the world and are openly avowed as partners. There is no concealment about their connections with the firm—they are real partners.

(b) *Nominal partners*, on the other hand, are those who represent themselves or permit others to represent them to the pub-

lic as partners, but who really are not so. They do not share in the profits of the partnership, but under certain circumstances may be held liable for the firm debts.

(c) *Secret partners* are those whose relation with the partnership is concealed from the public. They may, however, have an active part in the management and control of the business.

(d) *Silent partners* have no active part or voice in the management of the business of the firm, but they do participate in the profits as partners. Their connection with the firm is not necessarily concealed from the world.

(e) *Dormant or sleeping partners* (as they are sometimes called) are partners who are unknown as such to those who have dealings with the firm; they have no part or share in the control or management of the firm business but they do share in the profits.

§ 225. **How formed.**—As between the parties themselves a partnership is founded upon a voluntary contract, and as such must have all the essential elements requisite to the forming of any other contract. When a contract of partnership is once formed, no other person can afterwards be admitted into the firm as a partner without the consent of each of the partners composing the original firm.

In the absence of statutes no particular or peculiar form is necessary to create a partnership agreement. The contract may be express or implied; it may be written or oral. If written, the document need not conform to any specific wording. The written instrument is familiarly known as "Articles of Co-partnership."

While it is not necessary under the common law that the agreement be in writing, regard must be had for that section of the "Statute of Frauds" which provides that any contract not to be performed within one year must be in writing and signed by the parties to be charged. This requirement applies to agreements for the relationship to begin more than one year from the date of the agreement, or to last longer than one year from the time of forming.

When the partnership is to continue for any length of time or where there are many interests involved, it is desirable that the agreement be written, care being taken to see that the intentions of the partners are definitely expressed in order that there may be no future misunderstandings. When a contract is once reduced to writing it is presumed to contain the complete agreement of all the parties.

The following is a practical illustration of a written agreement of copartnership:

Articles of Copartnership.

This contract made and entered into on this the 2d day of April, A. D. 1921. by and between C. W. Keeland of Springfield, Illinois, of the first part and A. D. Munson of the same city and state of the second part.

WITNESSETH: That the said parties have this day formed a copartnership for the purpose of engaging in and conducting a retail hay, grain, feed and coal business under the following stipulations which are made a part of this contract:

1. The said copartnership is to continue for a term of three years from date hereof.

2. The business shall be conducted under the firm name of C. W. Keeland & Co.

3. The investments are as follows: C. W. Keeland, \$1,500; A. D. Munson, \$1,500.

4. All profits or losses arising from said business are to be shared as follows: C. W. Keeland, one-half; A. D. Munson, one-half.

5. Full set of books to be kept and financial statement rendered annually.

6. Each partner is to devote his entire time and attention to the business and is not to engage in any other enterprise without the written consent of the other.

7. Each partner is to have a salary of \$100.00 per month, the same to be withdrawn at such time or times as he may elect. Neither partner is to withdraw from the business an amount in excess of his salary without the written consent of the other.

8. C. W. Keeland is to have general supervision of the business, place all orders for merchandise, have charge of the books, and sign all business papers or authorize the bookkeeper to sign them. A. D. Munson is to have charge of the coal yard, check all incoming merchandise, and see that this is delivered to the proper warehouse. In addition to the duties outlined each partner is to attend to such other duties as shall be deemed necessary for the successful operation of the business.

9. Neither partner is to become surety or bondsman for any one without the written consent of the other.

IN WITNESS WHEREOF, The parties aforesaid have hereunto set their hands and affixed their seals on the day and year above written.

C. W. KEELAND [Seal]

A. D. MUNSON [Seal]

§ 226. **The contract.**—Written articles of copartnership should contain the following stipulations, with such additional provisions as may be applicable to a particular undertaking:

1. Date.
2. Names of the partners.
3. Statement that they are to be partners.
4. Nature of the business or undertaking.
5. Duration of the relation.
6. Name of the firm and location.
7. Capital stock and each partner's investment.
8. Payment of expenses; sharing of losses.
9. Distribution of profits.
10. Right to withdraw money for private use.
11. Keeping of books or accounts.
12. Duties of the several partners.
13. Restraint upon partners as to becoming sureties, etc.
14. Special provisions and stipulations.
15. Proper provisions for dissolution.
16. Division of assets after dissolution.

§ 227. **Partners by implication.**—Persons may sometimes be held liable as partners to third parties or strangers, although they are not partners as between themselves and even though they may have expressly stipulated that they did not intend to form a partnership. The reasonableness of this rule is that it tends to decrease imposition in business, of which there is always too much, even with laws for its prevention. An agreement to form a partnership at some future time does not make the parties liable as partners nor does it create a partnership.

If a person so conducts himself as to justify others dealing with a firm to believe that he is a partner he will be held liable as such. If one lends his name as a partner or declares that he has an interest in the business or permits his name to appear in the advertising matter of the firm and makes no effort to prevent it, he, too, will be liable as a partner upon principles of public policy to prevent fraud. This liability may also arise when a partner retires from the firm without making the retirement known to persons who had former dealings with the partnership. However, the acts or representations of one person can not make another liable without his consent or co-operation, either by word or act; nor is he liable to creditors who in truth knew he was not a partner. The use of a man's name without his knowledge can not subject him to liability; the holding out must be without protest on his part.

§ 228. **Test of a partnership relation.**—When persons having business dealings with each other do those things which the law declares constitutes a partnership, they will be held as partners. And if a partnership exists between the members themselves, then it must exist as to third parties. There are no prescribed acts which constitute such conduct as to induce others to believe that one is a partner, causing him to be liable to third parties; nor is there a prescribed test for determining a partnership. It is a question of both fact and law.

Sharing of profits.—It was thought for a long time that the sharing in the profits of a business constituted one a partner. While the sharing of profits is a leading characteristic of a partnership, yet it does not necessarily follow as an evident fact. The

determining factor should be whether the profits were shared as proprietors or co-owners. If the sharing of profits is merely as wages or compensation for service then a partnership relation does not exist.

§ 229. Rules for determining the existence of a partnership.—To the uninformed the question as to what constitutes a partnership may appear to be easily answered; that is not so. It is one of the most technical phases of partnership law. In addition to what was stated in the preceding sections the following rules govern in determining whether a partnership exists:

First. Common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

Second. The sharing of the gross returns does not of itself establish a partnership.

A sailor shipping on a whaling voyage was to receive a share of the oil for his services. He took it as a servant and not as a partner. (4 Esp. 182.)

Third. The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business. But he is not to be so considered if such profits were received in payment:

- (a) As a debt by installments or otherwise.
- (b) As wages of an employee or rent to a landlord.
- (c) As interest on a loan, though the amount of payment vary with the profits of the business.

Beecher rented a hotel from Bush, agreeing to pay daily a sum equal to one-third of the gross receipts. They were not considered partners. They were landlord and tenant.

By contract, King was to furnish Nolan a stock of goods and keep it replenished; it was to remain King's property, but Nolan was to sell the goods, turning over all the cash received each day and drawing \$50.00 per month. At the end of a term the latter was to stand one-third of the loss, take one-half the profits in merchandise on hand. They were partners, as they were carrying on the business in common as proprietors.

In a large factory many hundreds of men, in addition to receiving their wages, received each a proportionate share of the net profits. This does not make them partners, but is a contract of employment in which the compensation for service is paid from the profits of the business.

Where several persons associated themselves together in a factory to manufacture a commodity, each of them taking charge of a specific department, or performing a definite duty, and each receiving a stated salary, nothing being said about the profits or losses, it was held they were partners since they stood in the relation of principal proprietors of the business. (20 Or. 139.)

Anderson loaned Smith a sum of money to start the latter in business. Anderson was to receive, in lieu of interest, a percentage of the profits of the business.

Anderson was not Smith's partner, nor was he liable as such to the creditors. The owner of a farm leased it and furnished the stock and one-half the seed grain, and in return he was to receive one-half the profits. This did not constitute a partnership, but the parties were co-tenants in the products of the land. (68 N. W. 240.)

§ 230. The firm name.—A firm name, under which the business is transacted, is useful as a matter of convenience and identification, but is not a necessary feature of a partnership. In the absence of restrictive statutes, the business of the firm may be

carried on under any name the members choose—provided it does not interfere with the rights of others; it may be a fictitious name, the names of the partners, or it may be the names of one or more of them. A partnership may act in the firm name or in the individual names of the parties.

The statutes of some states forbid the use of "& Co.," or "& Company" unless represented by an actual partner. Likewise the use of the name of a retiring partner is forbidden unless the name has become a "trademark."

Real property must be owned in the names of the partners individually, and not in the firm name. A conveyance of real estate must be signed by each of the partners in whose name the property was held. Likewise, actions at law must be brought in the names of the persons composing the firm.

§ 231. **Partnership property: capital.**—The capital of a firm is the total contributions made by all the partners to the common fund for the purpose of carrying on the business of the partnership. A partner's investment need not be in money, but may be in the form of property, patents, trade-secrets, good-will, or anything else of value; even the use of one's own name may be considered as a valuable asset.

The contributions of the partners need not be equal; one may furnish money or property, while another may give time, skill, or experience. The right of any partner to increase or diminish his investment to the capital of the firm is subject to the consent of the other partners. All the partners are presumed to have equal rights in the use of the capital of the firm, but upon dissolution it is returned to the partners—after the debts are paid—in the same proportions as it was invested, so that, if one merely contributed his skill or services, he would not participate in the distribution. Sometimes the use of property is invested, the title remaining in the name of the individual partner, and upon a dissolution such property would be returned to the one holding the title.

Partnership property includes the property, or anything of value, acquired with partnership money or property, or which belongs to the partners as a firm—unless there is an understanding or agreement to the contrary. Property bought with the firm's money, but in the name of one of the partners, is considered partnership property. And again, each partner is entitled equally to the possession of the property of the firm, one as much as another.

Land was bought by parties in undivided ownership before a partnership was formed between them. The property was bought with individual funds and no entries were made on the firm books showing that the land was regarded as partnership capital although it was used by the firm in conducting a mill. The court ruled that "where persons, who afterwards become partners, buy land in their individual names, and with their individual funds, before the making of a partnership agreement, the land will be regarded as the individual property of the partners, in the absence of an agreement subsequently entered into by them to make it firm property. (153 Ill. 244.)

QUESTIONS

What is the purpose in forming a partnership? Mention the several advantages to be derived by such a combination.

What is a partnership? For what purpose must it be formed? Would a voluntary association formed for charitable, benevolent, and social purposes be a partnership? Can a partnership be formed for the purpose of hunting?

The partners may be known collectively under what name? Individually?

For what purpose is each partner the agent of the other? To what extent is each partner jointly and individually liable? Who may enter into a partnership? How may partners be classified? Explain and illustrate each particular class.

How is a partnership formed? After a partnership is once formed, how may additional partners be added? Will an infant's agreement to enter into a co-partnership bind him personally? Name the stipulations ordinarily contained in written articles of co-partnership.

What is meant by a partner by implication? How may a person so conduct himself as to be held liable as a partner while in reality he is not one?

What is the ordinary test in determining whether certain persons may be held liable as partners? What is the determining factor?

Name the several rules for determining the existence of a partnership.

Is a firm name indispensable? What name may be used? What may constitute the firm name? May the partners adopt a fictitious name? In what name is real estate owned by partners? In what name are actions at law brought?

What is the capital of a firm? In what may a partner's investment consist? What does partnership property include? What right does a partner have to increase or diminish his investment? In what proportion is the investment returned upon dissolution? What rights does each partner have in the use of the capital of the firm?

CASE PROBLEMS

Case problem No. 153.—Defoe, the owner of a manufacturing plant, entered into an agreement with Dickens to manufacture for the latter certain articles. Under their contract Dickens was to pay the wages and expenses of running the plant, while Defoe was to hire and discharge the employees. What was the relation between Defoe and Dickens?

Case problem No. 154.—Stewart and Wallace entered into an agreement to conduct a drygoods store in the name of Stewart, who was to furnish all the capital. Wallace was to act as the manager and receive for his services one-third of all the profits. Does this arrangement constitute a partnership?

Case problem No. 155.—Larkin sold his business to Clark on terms that Larkin was to receive for a period of years a definite share of the net profits of the business. Does this constitute a partnership between Larkin and Clark? What relation is created?

Case problem No. 156.—Plaintiff and defendant formed a partnership for the purpose of conducting a mercantile business. Plaintiff invested \$5,000.00 of the capital and defendant \$2,500.00. Both gave their entire time to the management of the business, but there was no agreement as to how the profits should be divided. At the end of the first year, they determined to dissolve. The firm had on hand \$2,000.00 of undivided profits. How much should each be entitled to receive from the profits, and the capital respectively.

Case problem No. 157.—Manning, of the firm of Manning & Hart, sells his interest to Blackwell, the firm to continue under the old name. The new firm enters into a contract with Brown & Co., for merchandise. Brown & Co. had done business with the old firm and had no notice of Manning's withdrawal, though Manning had published a notice of the dissolution in a newspaper. The new firm failed and Brown & Co. brought suit against Manning. Can they recover and why?

CHAPTER XXXVI.

MUTUAL RIGHTS AND DUTIES OF PARTNERS AS TO EACH OTHER.

§ 232. **Good faith.**—The relation constituting a partnership is one of trust and confidence; each partner owes to his copartner the exercise of the highest integrity and good faith. A partner will not be permitted to receive the benefits of a firm bargain for himself alone without the consent of the other partner or partners. Therefore, one of them can not secretly renew the partnership lease in his own name. And if a lease is taken in the name of an individual partner, the benefit will inure to the entire firm.

A partner will not be allowed to engage in any other business if it competes with the firm's business or in any way disables him from performing his duties as a partner, unless there is an agreement to the contrary. Nor can he lend to himself the firm's money without consent of his copartners. Of course a partner may receive any personal advantage or profit outside of the affairs of the firm with which he may be connected, without having to account to the firm for it.

§ 233. **Management.**—Unless they have stipulated otherwise, it is the right of each partner to have an equal part in the management of the business in which they are engaged; to have free access to the books; to participate in all the affairs of the firm and see that they are properly conducted in accordance with the partnership agreement. In other words, one partner has no more authority than another; or, to put it affirmatively, each partner has as much voice in the management as all of the partners have.

On the other hand, they may agree that one or more of them shall have more control over the business or certain parts of it than the others, or even that some of them shall have no authority in any part of the management at all.

§ 234. **Compensation.**—Unless they have mutually agreed otherwise, a partner is not entitled to compensation for services rendered the firm. A partner must be contented with his share of the profits. This is so even though his services may be more valuable than those of the other partners, either in promoting the interests of the firm or in being more active in conducting the business. Why should one partner be paid for attending to

the business and making it a success any more than any other member of the firm?

If one partner is to do more than his share of the work, it may be agreed that he is to receive compensation. Unless there was a prior arrangement for payment of such services there would be a continual controversy between the partners as to the value of their individual services.

However, if one of the partners should purposely neglect his duties, the copartner would be entitled to more than his proportionate share of the profits. But it is probable it would require proceedings in court to settle this question.

§ 235. **Trading and nontrading firms.**—A partnership may be formed either as a trading or a nontrading concern. In a trading partnership the firm is engaged in buying and selling or manufacturing as a business; and if not so engaged, it is a nontrading partnership, sometimes called a “partnership of occupation.” The distinction is important in order that one may know the powers of a partner in creating partnership debts and the issuing of firm notes. Partners engaged in trade have an implied authority to bind each other by promissory notes executed in the firm name. In a nontrading partnership the partners have no such implied authority.

Illustrations of a partnership composing a trading firm would be such as are engaged in conducting a grocery store, whether wholesale or retail; dealers in cattle or lumber; merchant tailors. A nontrading firm would be one composed of lawyers, physicians, printers, or hotelkeepers, and the like.

Thacker, Webster, & Ellison were engaged in the real estate, insurance, and collection business. Webster, one of the partners, purchased lumber in the name of the firm, to repair houses of which they had charge, and gave the firm name for it. It was held that the business they were engaged in was not of such a nature that one of the partners could bind the others by a promissory note. (78 Mo. 128.)

§ 236. **Authority of partners to bind the firm.**—The right and liabilities of the partners may be limited or restrained among themselves as they see fit. In the absence of an agreement each partner has the implied authority to bind the firm and with it the individual members and property by any act within the scope of the partnership business, in dealings with third parties. And even should there be an agreement restricting their authority third parties will not be bound unless they have had notice of such limitations. Partners being the agents of the whole partnership, are presumed to have full authority; and every person with whom a partner deals in the way of business has a right to consider the latter as the company, regardless of who may compose it. Furthermore:

(1) A partner may compromise and release a firm claim, even though he accepts a nominal amount.

(2) One partner may receive the money due the firm and

give receipts and the other partners will be bound, though he never turns in the money.

(3) He may make contracts, whether good or bad, or vary a contract previously made by all of them, and the firm will be bound.

(4) In a trading firm he may borrow money in the firm name, give promissory notes, mortgage and pledge the personal property of the firm, and they will be bound, although he may abuse this trust for his own benefit.

(5) He has authority to sell part or the entire stock of goods at one sale and warrant the same. He may also transfer the property in payment of the firm debts.

(6) Each partner may buy goods on the firm's credit, even though such act runs the partnership into overwhelming debt.

(7) He may insure the property, cancel the policy, collect the losses.

(8) A partner has the right to draw checks and to endorse and cash checks drawn in favor of the firm name.

(9) One partner may engage employees, appoint agents, and make contracts with them that will bind the firm.

(10) He may make declarations and admissions adverse to the interests of the firm. Notice to one of the partners will be notice to them all, and a demand on one is a demand on all of them.

§ 237. **Partners without authority to bind the firm.**—(1) A partner does not have the implied power to submit the controversies of his firm to a stranger for arbitration—but must have the consent of his copartners.

(2) Neither can a partner bind the firm by a contract of guaranty or suretyship.

(3) A partner has no implied right or authority to make a general assignment for the benefit of creditors, or to bind the firm by a confession of judgment.

(4) He can not bind the firm by contracts under seal; a partnership has no seal.

(5) One partner has no authority to bind his copartners by a deed to real property, or to make a lease.

(6) A partner can not bind the firm in the purchase of goods not connected with the known business of the partnership; neither can he sell property not held by the firm for sale, nor can he sell to himself.

(7) He can not discharge a private debt by agreeing that it shall be set off against one due the firm.

§ 238. **Partners jointly liable.**—Partners may make such agreements as they choose among themselves as to their individual

liabilities for partnership debts, but such agreements will not release them as to third parties.

The firm's property, both real and personal, is liable for the payment of the partnership debts, and if there is not sufficient partnership property to satisfy the firm's debts, then the individual property of each partner may be taken to pay the same. If any one partner should advance more than his proportionate share, he has a right to recover the excess of his share, ratably, from his fellow partners.

A partner can not escape his liability by withdrawing from the firm or by selling his interest. He will, unless released by the creditors, still be liable for debts contracted while he was a partner. Nor will an incoming partner be held responsible for debts of the old firm incurred previous to his admission, unless he expressly assumes such liability.

The partnership will be liable for fraud, misrepresentation, or other wrongful act of a partner done in the ordinary conduct of the business even though the partners knew nothing about it. But the copartners are not bound by illegal contracts made by a partner, as persons entering into such contracts are presumed to know the law and contracts contrary to law can not be enforced.

A partner while engaged in collecting debts due the firm carelessly or wantonly ran over the plaintiff and seriously injured him. The partnership was held liable. (31 N. E. 412.)

Brown borrowed money from Smith for partnership use and agreed to pay an illegal rate of interest. The firm was not bound because it was in violation of law.

Plaintiff, a woman, placed in the hands of a member of a real estate firm a sum of money to pay off an incumbrance on her property. This was unknown to the other members of the firm. One of the defendants used the money in private speculation and lost it. The partnership was liable for the loss. (144 Pa. St. 304.)

Dissolution of a Partnership.

§ 239. **How dissolved.**—There are three general ways in which a partnership may be dissolved. They are:

First. By acts of the partners.

Second. By a decree of court.

Third. By operation of law.

(1) **By acts of the partners.**—The common method of dissolving a partnership is by acts of the partners. This may be brought about in any one of the following ways: (a) agreement, (b) withdrawal, (c) alienation, (d) limitation.

Agreement.—Partnership being founded upon a contract, it may be terminated the same way. The time may be fixed at the formation of the relation, or at any subsequent time. If no time is set, it may be ended at will by any of the partners.

Withdrawal.—Even though the partnership is for a definite time, a partner may withdraw before the expiration of that time and thus cause a dissolution. One can not be compelled to be a partner against his will; but if he withdraws from the firm before the time agreed upon and without the consent of the other partners, he will be liable to them for any loss they may sustain by his act.

Alienation of interest.—The sale or assignment of a partner's interest in the firm works a dissolution, even if made to one of the other partners.

Limitation.—The accomplishment of the business for which the partnership was formed, a sale of the entire property, its complete destruction, loss or abandonment—any of these will serve to dissolve the partnership.

§ 240. (2) **By a decree of court.**—A partnership may be dissolved by a judicial decree. If a partner wishes to withdraw before the expiration of the time agreed upon, he may seek to have a court dissolve the partnership relation and thereby escape liability for damages. To do this there must be a valid reason; a court will not interfere for a trivial cause. The usual grounds for a decree of court are: (a) misconduct, (b) inability to act, (c) impossibility of success.

Misconduct of a partner.—A court will act where one of the parties practices fraud on the other members of the firm, or when he is guilty of habitual intoxication, or gross immorality, is convicted of crime or other misconduct; but the complaining party must not be the one guilty of the wrongdoing. Continual quarreling has been held as a sufficient reason.

Inability to act.—When one of the partners is to furnish the capital and another the skill, if the one furnishing the capital should be unable to keep his agreement or the one having the skill should become sick or otherwise incapacitated, a court will order a dissolution.

Long and continual absence from the business, or the engaging in a rival business by one of the partners, or his permanent insanity, would be grounds for a dissolution.

Impossibility of success.—If the undertaking is impracticable or incapable of being put into operation, or if put into operation would result in serious loss and bankruptcy, the court will dissolve the partnership. So, also, if dissension arises among the partners of so serious a consequence as to make it impossible to continue longer, legal dissolution is allowable.

§ 241. (3) **By operation of law.**—The events that will dissolve a partnership by operation of law are: (a) death, (b) bankruptcy, (c) war.

Death.—The death of a partner immediately dissolves the part-

nership relation. In some states where a partnership is formed for a definite period of time, it is permissible to provide in the agreement that upon the death of one of the partners his personal representative may carry on the business in connection with the remaining partners.

Bankruptcy.—The bankruptcy (financial death) of a partner or of the firm, or an assignment for the benefit of creditors dissolves the partnership.

War.—A declaration of war between different countries, or in different parts of the country in which the partners are severally resident will dissolve the firm. After peace is restored the partnership may be resumed.

§ 242. **After dissolution.**—When a dissolution occurs the sole business of the partners is to wind up the firm's affairs. The property is to be turned into cash, the debts of the firm are to be paid, and the remainder of the money, if any, is to be divided among the partners.

If the dissolution was caused by the death of one of the partners, the surviving members have authority to do all those things necessary to settle the firm business. They may collect the money due; give receipts; dispose of the property; and complete unfinished contracts; but they can not undertake any new business. They are merely agents of the late firm to collect its assets and pay its debts.

§ 243. **Notice of dissolution.**—Often when a partnership is dissolved, a new partnership is immediately formed, new contracts are made, and new debts incurred. Such changes may happen without the knowledge of outsiders who act upon the belief that it is still the former firm. Notice should, therefore, be given to former creditors and other persons who have had dealings with the firm. This is necessary in order to relieve the retiring member from future liabilities.

A notice of dissolution will not be deemed necessary:

- (1) To those who were the partners.
- (2) When dissolved by operation of law.
- (3) When dissolved by a judicial decree.
- (4) When a dormant or secret partner retires.

LIMITED PARTNERSHIPS.

§ 244. **How formed.**—Limited partnerships are formed under authority of the statutes of the different states. They are unknown under the common law of England, and were introduced through the Roman law. New York was the first state to borrow the system and to pass a statute authorizing their formation; this was copied from the French Code. Since then most of

the other states have adopted similar statutes. In a general way these laws provide as follows:

(1) That certain persons may invest capital in a business and share in the profits, without being personally liable for the firm debts beyond the amount of their investment. Partners whose liability is thus limited are called "special partners."

(2) There must be at least one partner, called a "general partner," who shall manage the business, and be liable for the debts of the firm, the same as in an ordinary partnership.

(3) Special partners take no active part in the management of the business; and their investment must be fully paid in.

(4) A failure to comply with the requirements of the statutes will make all of the partners liable for debts the same as in an ordinary partnership.

Joint Stock Companies.

§ 245. **Some essential features.**—Joint stock companies are authorized under the common law and are regulated by statute law. This plan of organization is principally adapted to small and compact bodies who desire to utilize some of the features of a corporation and still retain a partnership relation between the members. Joint stock companies, as well as limited partnerships, have not gained in general favor; they have been largely supplanted by corporations. Some of the leading characteristics of a joint stock company are:

(1) Each individual member or shareholder usually is jointly and severally liable for all the debts of the firm contracted while he is a member, the same as a general partner.

(2) Actions are brought in the same manner as in an ordinary partnership, unless otherwise provided by statute.

(3) The capital stock is divided into shares which are transferable, and the transfer of a member's share does not dissolve the company. Neither does the death, bankruptcy, or admission of a new partner work a dissolution.

(4) An incoming member is not liable for the debts existing at the time of his admission.

(5) The business is managed by officers elected for that purpose by the shareholders. A member is not an agent of the company, unless selected as such, and has no authority to bind the company as in an ordinary partnership.

(6) A joint stock company may be dissolved by agreement or by an order of court.

QUESTIONS

What is the chief duty each partner must show towards the other? Will one of the partners be permitted for his own profit to enter into competition with his firm? If he engages in a competing business, to whom will the profits belong?

How much authority does each partner have in the management of the business? To what extent may the majority in a partnership control the affairs of the concern? How is the majority determined—by the number of partners or the amount invested? What is the right of a partner to salary? May he have any compensation beyond a division of profits? How determined?

What is a trading partnership? Give several illustrations of a trading partnership. Of a nontrading partnership. Why is the distinction important?

To what extent may a partner bind the partnership? Give at least five illustrations of this power. In what cases does he not have the implied power to bind the partnership?

To what extent is the individual partner's property liable for the partnership indebtedness? How can he escape his liability?

May one partner be sued alone (a) for the debt of his partnership? (b) for the debt of the partnership?

How may a partnership be terminated (a) by the acts of the partners? (b) by decree of court? (c) by operation of law?

What rights still remain after a dissolution occurs? Why should notice be given of the termination? When is such notice unnecessary?

How are limited partnerships formed? What provision is made in the statutes of your state for limited partnerships? In a general way what do these statutes require?

What is the nature of a joint stock company? In what respect does it differ from an ordinary partnership? Is it a partnership?

Write a recapitulation of the subject of partnership.

CASE PROBLEMS

Case problem No. 158.—Andrews and Shepherd are partners in conducting a grocery store. During July and August, Shepherd is ill and has to go to a hospital. Shepherd's share of work is all thrown on Andrews. Is Andrews entitled to compensation for the extra work performed? If additional help had been employed to do Shepherd's work could Shepherd have been held individually liable for it, or should it have been paid out of the firm's money? If Shepherd had gone away on a pleasure trip, and Andrews had to do all the work, would he have been entitled to extra compensation?

Case problem No. 159.—Mulcahey, O'Brien, and Finnegan, were partners in conducting a grocery store. Each partner had a one-third share in the business. Finnegan died. What effect did this have on the dissolution of the partnership? Under what conditions could Finnegan's widow be admitted into the firm and take over her late husband's share? (42 Ill. 343, and 109 N. Y. 333.)

Case problem No. 160.—A—— and B—— were partners. A—— without the knowledge or consent of his partner made a bill of sale in the firm name conveying the entire stock belonging to the firm to X——. Will B—— be bound and under what rule of law? (30 N. Y. 101.)

CHAPTER XXXVII.

CORPORATIONS.

General Nature.

§ 246. **Classification.**—A corporation is a body consisting of a number of persons formed and authorized by law to act as one individual. They are classified as (a) *public corporations*, and (b) *private corporations*.

Public corporations are such as are created for the administration of public affairs—governmental purposes—exclusively. States, counties, cities, school districts, and the like are familiar examples.

Private corporations are of two kinds:

First, those created for social, charitable, or educational purposes; as an asylum or hospital, college, athletic club, and similar institutions. They are not formed for profit and have no capital stock.

Second, those created for the private pecuniary profit of its members; a bank, manufacturing or mercantile establishment, railroad, and the like are common examples. They have a capital stock and are termed private business corporations. It is with this class we are interested.

§ 247. **Early history.**—The word “corporation” is from the Latin, meaning a *body*. According to legal history corporations are of ancient origin, being adopted from the Greeks by the Romans. The first corporations at Rome were formed for the regulation of trade and for the purpose of religion. It was from the Romans that the early provisions of the common law relating to corporations were borrowed. Lord Coke called them “the greatest idea ever conceived by human brain, save none.” As early as the middle of the twelfth century a corporation was likened to a flock of sheep, which remains the same flock although particular sheep successively depart.

In the early history of America corporations for business purposes were scarcely known. As late as 1829 it was stated that none existed during colonial times. This was not because the law did not permit them but the business of the people did not demand them. With the progress made in discoveries, inventions, manufacturing, and commerce in general, corporations have become one of the great agencies of our modern commercial development. Corporations build, own, and control school houses,

colleges, hospitals; mills and factories; railroads, canals, steamship lines; banks, loan and trust companies; mercantile associations; cattle companies, packing houses and stockyards. Indeed, capital could not be secured in quantities sufficient to launch and maintain the great industries which exist around and about us except through corporations.

§ 248. **Definition.**—A corporation was defined by the Supreme Court of the United States¹ as “An association of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without the dissolution of the association.” This means that a corporation is in reality an artificial or judicial person, one created by law. When created and brought into existence by law, it has the same privileges as any citizen and is governed by the same law.

“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.” (Chief Justice Marshall in the Dartmouth College case.)

A corporation differs from a partnership in the *manner of organization, methods of conducting the business, responsibility of investors, and the manner of dissolution*. It agrees in the object for which it is formed—the combination of capital for the mutual benefit of its members.

§ 249. **How formed.**—The right to form a corporation extends to all persons who comply with the conditions of the law. In this country a corporation is created by authority of the laws of the state in which it is organized. While the requirements differ in detail, in the various states, the method of procedure is very generally the same. The plan commonly followed is for the persons desiring to organize to execute and file with a public official, designated by the state, articles of association in which is set out:

- (1) The name of the proposed corporation.
- (2) The purpose for which it is to be formed.
- (3) The amount of capital stock.
- (4) The number of shares into which the capital stock is divided and the par value of the shares.
- (5) The place where its principal business office is to be located.
- (6) Its duration.
- (7) The number of directors and the names of the persons selected as directors for the first year.
- (8) The names and addresses of the subscribers with the amount subscribed, and the amount actually paid in lawful money.

Ordinarily, the statutes provide that the articles of association must be signed and acknowledged by a certain number of per-

¹ Justice Field, 108 U. S. 317, 330.

Articles of Association

Parke, Davis and Company of Detroit.

We, the undersigned, do hereby associate ourselves together for the purpose of forming a corporation under and by virtue of the laws of the state of Michigan. And we do hereby adopt the following as our articles of association:

Article 1. The name of the corporation hereby formed is Parke, Davis and Company of Detroit, Michigan.

Article 2. The object and purpose for which this association is formed is the manufacture and sale of chemicals and pharmaceuticals and all business incidental to such manufacture and sale.

Article 3. The amount of capital stock of this corporation is \$125,000, and the same is divided into 5,000 shares of \$25.00 each.

Article 4. The amount of the capital stock actually paid is \$81,950.00.

Article 5. The names of the stockholders, and their respective places of residence, and the number of shares held by each are as follows:

Hervey C. Parke	Detroit	836
George S. Davis	"	330
John R. Grant	"	836
William H. Stevens	"	748
Harry C. Tillman	"	528

Article 6. The office for the transaction of the business of this corporation is located at the city of Detroit, county of Wayne, state of Michigan, and said corporation is to be carried on in said county of Wayne.

Article 7. The term of existence of this corporation shall be 20 years from the date of the execution of these articles.

Article 8. The conduct and management of the business of this corporation shall be controlled by a board of five directors who shall be elected from the stockholders of this corporation on the day of the execution hereof, who shall hold their office for one year and until their successors shall be elected. And the annual election of directors shall be held on the second Monday of January each year thereafter during the existence of this corporation.

Article 9. There shall be elected from said board of directors a president, secretary, and treasurer, whose duties shall be designated in the by-laws and not inconsistent with the laws of the state.

IN TESTIMONY WHEREOF, We the undersigned associating together have hereunto set our hands and seals on the 14th day of January, A. D. 1875.

(Signed by the names of the foregoing stockholders.)

Acknowledgment.

STATE OF MICHIGAN, COUNTY OF WAYNE, ss.:

On the 14th day of January, A. D. 1875, before me, the undersigned, a notary public, in and for said county and state, personally appeared (names of stockholders) to me well known to be the persons described in and who severally executed the foregoing instrument and acknowledged that they severally executed the same as their free act and deed for the uses and purposes therein set forth.

(Signed) SAMUEL J. KELSO,

Notary Public, Wayne County, Michigan.

sons making application for a charter, the minimum number required in most states being three. There may also be a specification that a designated number must be citizens of the state in which the articles of association are filed.

§ 250. **The charter.**—After filing the articles of association a charter is granted. The charter is a written document setting forth the facts required by law, and is the corporation's authority for doing business. It gives the name of the corporation, the amount of the capital stock, the location, place of business, nature of the business, time of existence, and such other information as is required by the law of the state under which it is granted.

§ 253.—**Capital stock.**—The capital stock is the total stock (face value) authorized and outstanding although all of it may not be issued. The charter mentions the amount that can be issued, but it is not necessary to issue all of this unless required by state law. The capital stock is divided into a specified number of units of equal value called *shares of stock*. These shares may be of one dollar, ten dollars, one hundred dollars, or any other amount selected by the charter members, unless the statutes govern the minimum or maximum value of each share. The minimum number of shares that can be issued and the amount of capital required to be paid up is also fixed by the law of the different states. It would not be a good policy to permit a corporation to begin doing business without some capital at least.

QUESTIONS

What is a corporation? State the distinction between a public and a private corporation. Give several familiar examples of each. Partnerships must be for financial profit to be a partnership within the law—must a corporation? What kind of corporation is a railroad company? Can a corporation practice law or medicine?

Name a number of local corporations with which you are familiar.

Mention several advantages of a corporation. Can you suggest any disadvantages?

Define (a) a natural person, and (b) a corporation. In what respect does a corporation differ from a partnership?

How is a corporation ordinarily formed? Distinguish the formation of a corporation from that of a partnership. What must the articles of association usually contain? What is the least number of persons in your state who may form a corporation? What is the least number that may form a partnership?

What is a charter, and what does it contain?

Define capital stock. How is it divided? How does the capital stock differ from the property of a corporation?

CHAPTER XXXVIII.

POWERS AND MANAGEMENT.

§ 254. **Powers, rights and capacities.**—Under the common law, as soon as a corporation is formed and named, it acquires certain attributes which are necessarily and inseparably incident to it; as,

(1) *To have perpetual succession.*—The death or withdrawal of a member has no effect on the life of the corporation—it still exists. Death, desertion, or abandonment will not destroy it. The right of succession means merely for the length of time for which the charter was granted and not that it is immortal in the ordinary sense of the word. The better term would probably be, *continual succession*.

(2) *To sue and be sued*, complain and defend in a court in its corporate name. Every corporation must have a name by which it can be designated, and under which it transacts business. It may not use a name other than that given in the charter, nor is it permitted to use a name previously appropriated by another corporation. Some states require the name to begin with "The" and end with, "Company;" other states require the name to be followed by "Incorporated."

(3) *To buy real and personal property* necessary for the purposes of the corporation and hold or sell it for the benefit of its members and successors. The purchase or owning of real property is not an essential requisite to its existence, but the right is not denied unless restricted by the charter.

(4) *To have a corporate seal.*—Under the common law it was necessary to attest the acts of a corporation by a seal.

The Bank of Columbia, through a committee of stockholders, made a contract with Mr. Patterson to build a bank building. After its completion and acceptance by the bank they refused to pay for the work by saying, "We never put our seal to the contract, and, therefore, you can not hold us." The Supreme Court of the United States admitted that such was the law anciently, but also ruled that the technical doctrine that a corporation could not contract (make a promise) except under seal must have been productive of great mischief, and it would seem to be a sound rule of law that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises for the enforcement of which an action will lie. (7 Cranch 299.)

(5) *To make bylaws and regulations*, not inconsistent with existing law, for the government and management of its business and which are binding upon the members.

(6) *To appoint and remove such subordinate officers and agents as the business shall require.*

(7) *To make contracts*, which must be made under its corporate name. A corporation may therefore borrow money, issue negotiable paper, mortgage its property, make contracts of sale and leases, and do all other acts as a natural person necessary for the furtherance of the purpose for which the corporation was formed, so long as it acts within the scope of its authority.

§ 255. **Restricted powers.**—A corporation can not engage in any other business than that for which it was formed. It must also comply with the laws of the state in which it transacts business. If created for the purpose of conducting a bank it can not engage in manufacturing or trading. The authority of a railroad company to buy lumber to build depots would not be authority to buy lumber to build farm houses. When a corporation does an act which it has no right under its charter to do or in excess of the powers conferred upon it, the act or conduct is said to be *ultra vires*—beyond authority—and such acts are generally held to be void.

HOW MANAGED.

§ 256. **Officers and agents.**—The affairs of a corporation are in charge of officers who are elected by the board of directors. The stockholders elect the board of directors and thus have direct control of the corporation through their voting power. The directors are agents of the corporation and are responsible for its management. Married women and minors can be directors. The articles of association or bylaws fix the number of directors and their qualifications. Regardless of how large an interest a stockholder may have he can not take any part in the management of the internal affairs of the company, unless he is elected as an officer or appointed as an agent. Each stockholder is entitled to as many votes as he holds shares of stock. Hence, it follows that if one person, or group of persons, own a majority of the stock, by uniting their votes he or they can elect all the officers and thus direct the acts and policies of the company.

§ 257. **Cumulative voting.**—Some states provide for what is known as “cumulative” voting in the election of directors. By this means the minority stockholder may have some representation on the board of directors. Under the plan of cumulative voting each stockholder has the right to cast as many votes in the aggregate as shall equal the number of shares of stock held by him, multiplied by the number of directors to be elected. The whole number of votes may be cast for one candidate, or they may be distributed among two or more as desired.

A holds 200 shares of stock and B and C together own 300 shares in a corporation having 500 shares. If three directors are to be elected A can cast his 200 votes three times for one candidate, or 600 votes; and B and C would have a combined voting power of 900 votes with which they could elect two candidates by dividing their vote so as to give each 450 votes.

If a member does not wish to attend and vote personally he may authorize someone else to represent him. This right is called a proxy. The authority for granting proxies must come from the statutes, charter, or bylaws.

Proxy.

KNOW ALL MEN BY THESE PRESENTS, *That I, Peter Sterling, of Denver, Colorado, hereby delegate and appoint Andrew Jackson to be my substitute, agent, and attorney for me, and in my name and behalf, to vote at the election of directors or other officers, and at any meeting of the stockholders of the*
EDISON ELECTRIC LIGHT COMPANY
as fully as I might or could do if personally present and acting in my own behalf.

IN WITNESS WHEREOF, *I have hereunto set my hand and seal this first day of February, 1921.*

Witness,

PETER STERLING [L. S.]

RICHARD ROE.

QUESTIONS

What are the ordinary incidents of a corporation under the common law? What is meant by perpetual succession? Mention some other term more suggestive. In what name (a) is a corporation, and (b) a partnership sued? Must a corporation have a corporate name? What may this name be? May it use a name already in use by another corporation in the same state? To what extent may a corporation own real estate? Is the owning of real estate necessary to the existence of a corporation? Define bylaws, and regulations. How does a regulation differ from a resolution? To what extent may a corporation make contracts?

Ordinarily an individual may do anything not specifically forbidden by law. What may a corporation do? May a corporation organized for general railroad purposes (a) build and maintain a hotel and park? (b) devote part of its funds for maintaining a Y. M. C. A. for its employees? Has a manufacturing corporation the power to loan money? What kind does have such power?

How are the affairs of a corporation managed? In what way does a stockholder have part in its management? What are the principal duties of the directors? How are the directors selected? How many votes does a member have? What is a proxy? What is meant by cumulative voting? Give a concrete illustration showing the result of cumulative voting and explain its advantages.

CASE PROBLEMS

Case problem No. 161.—The Sunlight Publishing Company has five shareholders. Thackery owns 51% of the stock. Can he elect all the officers? If three directors are to be elected, how many can he elect?

CHAPTER XXXIX.

BODY CORPORATE.

§ 258. **Stockholder.**—One who owns stock—or shares—in a corporation is a stockholder or shareholder. As evidence of this ownership, he holds one or more certificates which show the number of shares he owns. It is not necessary (unless provided by state law) for the certificate to be recorded on the books of the corporation; but if the stockholder wishes to enjoy the privileges granted a stockholder, he must have his certificate registered so that the officers of the corporation will know who owns the various shares of stock. This information is especially necessary at the time a dividend is declared.

A stockholder does not own any part of the assets of the corporation, but shares with other stockholders in the distribution of these assets when the corporation is dissolved. If he wishes to dispose of his interest before dissolution, he can do so by selling his stock.

The corporation is, itself, a legal entity, and the ownership of the business vests in it, and not in the stockholders.

A tract of land in Virginia was sub-divided and sold. The deeds provided that "title to this land was never to vest in a person or persons of African descent." The People's Pleasure Park Company was a corporation whose stock was held entirely by negroes. This incorporation bought a part of this land to be used as an amusement park exclusively for colored persons. Plaintiff brought a suit to have the deed declared void, and the owners be restrained from the use of the property on the grounds that the corporation was "a person of African descent" within the conditions of the deed.

The court ruled that the conditions of the deed had not been violated. A corporation being a person of its own individuality and identity, it does not partake of the qualities of its members. Notwithstanding every one of the members of the incorporation was a negro, this did not have the effect of making the People's Pleasure Company "a person of African descent." (109 Va. Rep. 439.)

§ 259. **Kinds of stock.**—The laws which create the corporation govern the issuing of stock. When a corporation issues stock, it expects to make a profit by the use of the capital raised by that stock. If it makes a profit it is divided among the stockholders. Such profits are called dividends. There are two kinds of stock issued by corporations: common stock and preferred stock.

§ 260. **Common stock.**—All stock issued by a corporation is common stock unless otherwise designated. The owners of common stock share in the profits in proportion to the number of shares they own. The word "common" in this connection signifies that the holders of that kind of stock are entitled to an

equal pro rata division of the net earnings, if there be any. Thus, if a person owns one hundred shares in a corporation of one thousand shares, he will be entitled to one-tenth of the profit set aside by the board of directors for distribution. He receives the same proportionate part of the profit as the other stockholders, and does not enjoy any special privileges.

§ 261. **Preferred stock.**—Preferred stock is issued with a contract that a fixed percent will be paid out of the income or earnings as a dividend. This is paid before the holders of common stock may participate in the dividends. In case the profit is not sufficient to pay the dividend on the preferred stock in full the directors may declare only a part of it, but the claim of the preferred stockholders for the remainder of the dividend not declared cumulates, and the full amount of these cumulated dividends must be paid before any dividends are paid to the holders of common stock unless the stock provides otherwise.

If the earnings applicable to the payment of dividends are just sufficient for the fixed annual dividends, they will be entirely absorbed by the preferred stock. If they are more than sufficient, the surplus may be applied in paying dividends on the common stock. This is the usual custom.

The value of any stock depends upon the dividends paid; therefore, it is possible for the common stock to become more valuable than the preferred stock. If there is a large profit, and the amount set aside by the board of directors as a dividend pays the preferred stockholders their fixed dividend and the common stockholders a larger dividend than this, the common stock may be more valuable. At the beginning of the business, the preferred stock offers the more attractive investment, because the amount of dividend is fixed and the purchaser knows in advance the amount he is to receive.

It is very largely in the discretion of the directors whether dividends shall be declared, when there is a surplus of profits on hand. If dividends are not declared the profits become part of the assets of the corporation to be used in furthering the business. Until a dividend is declared the profits do not belong to the individual stockholders.

A stockholder in a corporation that had accumulated a surplus of \$150,000 brought a suit to have it distributed as dividends. Dividends had been paid the previous ten years at the rate of 25 per cent. It was held by the court that as the surplus was profitably employed by the directors in purchasing materials to be used by the company, and that the directors had not acted unreasonably or capriciously, but for the best interests of the corporation, there should be no interference on the part of the court. (62 N. Y. 18.)

Watered stock.—Stock not paid in money or property is termed “watered stock.” There are three methods of issuing such stock. (1) Where the shareholder buys a certain amount of stock at less than par value and a certificate is issued paid up in full. (2) Property at an exaggerated profit or inflated value has been given in exchange for certificates of stock. (3) Issuing stock dividends when none have been earned.

Form of transfer printed on the back of a stock certificate.

For Value Received _____ *hereby sell, assign and transfer to*

the Shares of Stock within mentioned and hereby authorize the transfer of the same on the Books of the Company.

Witness _____ hand and seal this _____ day of

190 _____

Witnessed by _____

seal

§ 264. **Rights of stockholders.**—A share of stock represents a contract between the stockholder and the corporation and invests the holder with certain rights, as:

First.—He has the right to have issued to him his certificate for the number of shares to his credit, on the books of the company, which gives him the privileges of a stockholder.

Second.—Stock may be bought and sold like personal property. When so sold, the transferee (the purchaser) has a right to have the transfer recorded upon the books of the company and to have issued a new certificate. Until such entry is made he is not entitled to dividends and other privileges. The officers must make the transfer although they may believe that the new ownership will be detrimental to the best interests of the company.

The plaintiff acquired shares of stock in the Standard Oil Company. He had previously written a pamphlet attacking the methods of that company and had thus made himself very obnoxious to the corporation. The officers refused to transfer the shares upon the stock books of the company on the ground that the plaintiff was hostile to the Standard Oil Company. Upon a suit being brought to compel the transfer the court sustained this right and forced the recording of the stock. (134 N. Y. 174.)

Third.—Stockholders have an undivided interest in the business which gives them the right to attend meetings of the stockholders in person or by proxy; to vote for directors; to increase or decrease the capital stock; or to make other important changes in the corporation.

Fourth.—A stockholder has the right to participate in the dividends if the same have been declared by the Board of Directors.

Fifth.—When the corporation is dissolved, the stockholders have a right to participate in any surplus that may remain, to be divided in proportion to the amount of stock each member holds.

Sixth.—Under such restrictions as the courts and statutes may

impose, a stockholder has the right to inspect the books and accounts of the corporation. This demand must be made in good faith, at a reasonable time, and for a proper purpose.

§ 265. **Liability of stockholders.**—The members of a corporation are not individually liable for its debts, unless there is a provision in the charter or statutory laws creating such a liability. But if the stockholder has not paid to the corporation the full amount of his subscription he is liable for the unpaid portion, if the amount is necessary to pay creditors.

If the corporation becomes insolvent and the assets are not sufficient to pay all the obligations, some states hold each shareholder individually responsible for the value of the shares which he owns; others relieve him of this responsibility. Different states impose different conditions.

The holder of national bank stock is liable for double the value of the stock. Stockholders in state banks may be subjected to a greater liability according to the laws of the state under which they are organized.

§ 266. **Liability of officers.**—The officers are the agents of the corporation. If they exceed their authority they are personally liable to third parties. If the officers are authorized to sign documents on behalf of their companies, they should sign the name of the company corporation and follow it with the signature of the president as its president and of the secretary as its secretary; thus,

THE EDISON CONSTRUCTION COMPANY,

By Richard Roe.....President.

By John Doe.....Secretary.

§ 267. **Manner of dissolution.**—A corporation continues during the time stated in the charter. This may be for an unlimited time or it may be for a definite number of years. If for a definite number of years it may be renewed any number of times, so that it is sometimes said that "A corporation never dies."

Nevertheless, a corporation may cease to do business, wind up its affairs, and voluntarily surrender its charter with the consent of its stockholders by complying with the statutes of the state.

If the charter was granted to perform some specific act or for a limited period of time it will cease upon the completion of the work or the expiration of the time.

A corporation may be dissolved by a judicial proceeding as a penalty for the doing of wrongful acts, the abuse of power, or where it has become *insolvent or incapable* of continuing business with safety to the public or its creditors.

The death of all the stockholders in a business corporation does not end its existence. The shares of the several members pass by bequest or descent,

and thus belong to some person who for the time will be a member of the corporation.

Insolvency does not extinguish its legal existence. If the capital is impaired, or wholly gone, this will not prevent the members from furnishing additional or renewed capital.

A corporation does not become dissolved merely by discontinuing its business. The cessation may be only temporary. Then again, the stockholders may decide to elect new officers and form a new management.

Comparative Difference Between Partnership and Corporation.

TOPICS	PARTNERSHIP	CORPORATION
Membership.	Two or more parties.	Subject to statutory regulations.
Creation.	Voluntary agreement.	By express authority of the state.
Entity.	Not a legal entity.	Is a legal entity.
Capital Stock.	No limitations or restrictions.	Must be a certain amount and not less than a specified sum.
Changes in Capital.	Increased or diminished at will.	Only by express permission.
Ownership.	Title in members, personally.	Title in name of corporation.
Management.	Under direct authority of each partner.	Only through appointed officers and agents.
Litigation.	Sues or is sued in names of members.	Sues and is sued in its corporate name.
Rights and Powers.	Unrestricted, may do anything lawful.	Restricted, regulated by statutes, charter, bylaws.
Sharing of Profits.	Equally, unless otherwise agreed upon.	Dividends, declared at discretion of directors; proportioned according to shares.
Transfer of Interest.	Works a dissolution.	Transferee merely takes owner's place.
Written Records.	No requirements in most states. (except for income tax purposes).	Certain books must be kept.
Publicity.	None.	Annual or frequent reports often required.
Taxes.	Ordinary taxes.	Special license, taxes, and fees.
Liability.	Jointly and severally liable.	Limited to capital and resources, unless otherwise provided.
Duration.	Limited.	Perpetual, unless otherwise limited.
Dissolution.	At any time.	Expiration of charter; permission of authorities; judicial decree.

Blue Sky Laws.—The general intent of the so-called "Blue Sky" Laws is to prevent the sale of worthless or speculative stocks and bonds of foreign corporations by fakers and financial sharks, thus protecting the ignorant and unwary from losing money in either deliberately fraudulent, or highly speculative, securities.

Thirty states have enacted such laws. These laws usually provide that before any individual, corporation, or copartnership

shall offer for sale any stocks, bonds, or obligations of a foreign (each state is foreign to every other state) corporation, a statement of the responsibility of the seller and the general financial condition of the corporation must be filed with a designated state official and a permit or license be obtained. Before such license is granted the official must investigate the merits of the securities offered for sale. Failure to obtain a license subjects the offending party to a fine, or imprisonment, or both.

QUESTIONS

What is a stockholder in a corporation? How is the ownership evidenced? What part of the assets does a stockholder own? In whom is the ownership of the corporate business vested? What is the necessity of having the stock certificate registered with the company?

Explain the difference between common stock and preferred stock. Which is the preferable kind to own and why? What determines the value of the stock? What is meant by watered stock and explain how it is created. What are dividends? How are they declared? Has a court the right to compel a company to declare a dividend out of accumulated profits?

What facts are usually stated on the face of a stock certificate? Describe the various steps taken in the transfer of a stock certificate. What special rights does the holder of stock have in the company? What right does the purchaser of stock have in having the certificate recorded in the books of the company?

What is the limit of a stockholder's individual liability? Compare this liability with that of a partner in a partnership. What is the liability of stockholders in a national bank? What is the liability of the officers of a corporation? How should they sign written instruments?

How long may a corporation exist? How is it dissolved? Compare the dissolution with that of a partnership.

What are Blue Sky Laws? Why so called? Is there such a law in your state? Do these laws apply to the sale of the securities of corporations chartered by the state? Securities offered for sale by mail?

Write a brief summary of the law of corporations, contrasting both advantages and disadvantages in comparison with a partnership.

Discuss why corporations are (a) beneficial, (b) detrimental to the common good.

CASE PROBLEMS

Case problem No. 162.—Shea was a stockholder in a corporation. He brought a suit to compel the company to permit him to examine the stock and transfer books. The company resisted on the ground that Shea was a stockbroker and wanted the information for his personal use. Result, and why? (234 Mass. 592.)

Case problem No. 163.—The by-laws of a certain corporation provided that the individual members should be personally liable for its debts. The corporation brought suit against Flint, one of the stockholders, on a note of that corporation, and that Flint had signed as Treasurer. What is Flint's liability? What is the factor that determines a stockholder's liability? (13 Mass. 539.)

Case problem No. 164.—The Nonquitt Spinning Company is a corporation engaged in the manufacture and sale of cotton goods. At the end of the year there was a substantial surplus in the hands of the treasurer. The directors decided to retain this surplus and not pay any dividends as in previous years. Several stockholders brought suit to compel the directors to declare a dividend. In your opinion what should be the decision of the court? (29 N. J. 504.)

CHAPTER XL.

INSURANCE.

General Principles.

§ 268. **Nature and origin.**—Insurance is a name applied to a conditional contract or agreement whereby one party, for a stipulated consideration, agrees to pay another a specified sum of money upon the occurrence of a contemplated event. That event may be one likely to occur, as the loss or damage of property through fire, water, theft, or accident; or one certain, sooner or later to happen, such as death. But it is always an event of which the time of occurrence can not be foretold.

Under a system of insurance, protection is provided against the danger of some loss. For this purpose a common fund may be accumulated by pooling small contributions from a large number of persons out of which a contributor is entitled to participate in case he has suffered a loss or damage. Thus, by dividing the risk among many the proportion of cost that may fall upon any one person is very small.

Here is an army marching. If you place 500 pounds weight upon the shoulders of a single man you crush him to earth. But an additional one pound may be placed on the shoulders of each man of 500 and the army will still march on. This is what insurance cost does with a loss.

While the idea of insurance originated in the remote past—its beginning being more or less doubtful—its practice is a development of recent times. The oldest form of insurance is doubtless marine insurance. It apparently began with merchants who in early times usually accompanied the merchandise they shipped to Mediterranean ports. These merchants paid an agreed sum to certain individuals who then guaranteed to pay ransom in the event of the merchant's capture by Moorish and other pirates, who in those days swarmed the seas; or to pay a fixed amount to the merchant's family if he were lost. Gradually the field became widened and included the risk of loss through fire, shipwreck, or other hazards of the sea. From this practice has been evolved the modern principles of insurance, modified and adapted to meet every imaginable demand of our present industrial and social needs.

§ 269. **Kinds of insurance.**—Insurance may be divided into two distinct groups: (1) property insurance, and (2) personal insurance.

Property insurance.—It is now possible to insure property

against loss occasioned through almost any conceivable cause. The most common risks are, however:

(a) Fire insurance, which is an undertaking to indemnify the insured for a fixed period against loss to specific property, caused by fire.

(b) Marine insurance, which applies to loss or damage to vessels and their cargoes or other property exposed to any of the perils of navigation.

(c) Casualty insurance, which insures against loss arising from accidental injury to property, such as losses from steam boiler explosions, plate glass, and the like.

Personal insurance.—There are numerous classes of personal insurance of which the following are the most common and best known:

(a) Life insurance, which insures one person against loss by the death of another.

(b) Accident insurance, which provides for loss arising from accidental personal injuries, the amount to be paid varying with the character and severity of the injury.

(c) Credit insurance, which is issued to merchants to protect them from excessive loss due to the failure of debtors to pay their obligations.

(d) Employer's liability insurance, which is insuring against loss for injuries to an employee while in the employ of the insured, for which the employer is liable.

(e) Fidelity and surety insurance, which is for the purpose of protecting the insurer against loss arising from the default or dishonesty of an employee. Surety insurance which is for protection against the nonfaithful performance of any service or contract.

(f) Title insurance, which provides protection against loss arising from a defective title or interest in real property.

(g) Automobile liability insurance, which insures an owner of an automobile on account of any injuries he may accidentally inflict on others while running his machine.

§ 270. **Insurance terms in common use.**—The party or company agreeing to make good the loss is the *insurer*, often called the *underwriter*; the other party is called the *insured*, and is known as the *policyholder*. The *beneficiary* is the person named in the policy to receive the benefits or proceeds that may accrue thereunder. The written contract containing the terms of the agreement is called the *policy*. The *face* of the policy is the sum to be paid by the insurer; the *premium* is the consideration paid by the insured; while the event insured against is the *risk* or *peril*; and the subject, right, or property to be protected is the *insurable interest*.

§ 271. **Kinds of companies.**—The two chief kinds of companies engaged in the business of insuring are *stock* and *mutual* companies.

A *stock company* is one owned and managed entirely by the stockholders for their individual profit, they alone participating in the dividends and likewise being liable for losses. The policyholders, unless they are also stockholders, have no say in the management of the company. The premiums are at a regular fixed rate.

A *mutual company* is one which has no capital stock, and in which the management is controlled by the policyholders through officers and directors elected by the members, they alone participating in the profits and sharing the losses. The premiums are ordinarily in the form of assessments, levied for the purpose of paying losses and other incidental expenses.

§ 272. **Formation of contract.**—An agreement to insure property need not be in writing in order to bind the insurer, unless required by statute or the corporate charter of the company issuing the policy. In many of the states the laws provide that in fire insurance a certain form known as a *standard policy* must be issued. Since it is almost a universal custom to use written policies, the presumption would be that when no policy has been written and no premium paid there is no contract of insurance. Whether the contract is oral or in writing, it must possess the essential elements of a contract to be enforceable.

Oral contracts are sometimes made in contemplation of the issuing of a written policy. Upon an application being made for fire insurance or where an agreement has been entered into but the policy is to be issued later, the agent may issue a receipt termed a *binder*. A binder will enable the insured to enforce his contract in case of loss before the policy is issued.

Who may be insured?—With a qualification hereafter mentioned, there is no difference between a contract of insurance and any other contract, so far as the capacity of the insured is concerned. The contracts of an infant are voidable, at his election, save for necessities, hence an infant may avoid at his option, an insurance contract he may have taken out. Should the infant elect to avoid such an agreement he can not recover the premiums paid, unless they more than pay for the insurance he has actually received. (56 Minn. 365.)

An application to be "insured" is no more than a proposition to the insurance company, and necessarily it must first be accepted before there can be a meeting of minds so as to form a binding contract.

Where the written proposal states the time and manner for the proposition to ripen into a completed contract, these conditions must transpire before the contract takes effect. (18 West Va. 782.)

The insured had entered into an agreement with the agent of an insurance company that the insurance was to take effect at a certain time, at a specified rate, but the policy was not delivered until after a loss by fire. The company was held liable since there was a valid parol contract for insurance. (56 Iowa 508.)

QUESTIONS

State in a general way the nature and origin of insurance. Explain how a large loss is proportioned among a number of individuals so that the cost to any one person may be a small amount.

What is meant by (a) property insurance? (b) personal insurance? Name the most common risks under each class. Name the difference between life insurance and property insurance as to the probability of a loss.

Explain the meaning of (1) insurer, (2) underwriter, (3) insured, (4) policyholder, (5) beneficiary, (6) policy, (7) premium, (8) risk, (9) peril, (10) insurable interest.

What is a stock company as applied to an insurance company? How is such a company managed, and how are the losses and profits distributed? In what respects does a mutual company differ from a stock company?

Under the common law must the contract of insurance be in writing?

What is meant by a standard policy?

What is a binder? Its purpose? What is the difference between a contract of insurance and any other contract.

Who and what may be insured?

CHAPTER XLII.

FIRE INSURANCE.

§ 273. **Fire insurance.**—This is an undertaking to indemnify the owner or person having an insurable interest in the property insured for loss or damage by fire. It includes buildings, merchandise, and other property on land exposed to injury by fire. It may also cover damage by water in fighting the fire.

§ 274. **Insurable interest.**—Any person competent to make a contract and having an insurable interest may be insured. The right to insure is limited to those persons who would be directly injured, that is, suffer a pecuniary loss by the destruction of the property. There may be as many separate and distinct insurances upon the same property as there are separate insurable interests connected therewith. If the insured had no interest in the property he could have no object in insuring it except as a mere speculation. This is contrary to law. If the interest is anything less than sole ownership, it must be stated in the policy. The insurable interest must exist in the insured at the time of the loss, otherwise the policy is void.

Examples of an insurable interest.—Landlord and tenant, mortgagor and mortgagee each have an insurable interest. Likewise, persons in whose care property has been intrusted, as innkeepers, common carriers, warehousemen, and bailees. A shareholder in a corporation has an interest in the property owned by the corporation; a partner has such an interest in the property of the firm. An agent may insure property in his possession belonging to his principal, but for which the former is responsible.

All insurable interests must be legal. Insurance upon an illegal interest is void, or if the contract contemplates an illegal use of it. The contract upon which interest is based must be valid, and enforceable in law, or an insurance upon it can not be sustained. A contract illegal in part is illegal in whole. The law "has no scale to weigh the degrees of illegality."

§ 275. **Assignment.**—If one sells his interest in the property, he parts with his insurable interest. While one can not recover for a loss occurring after he has sold the property he may, with the consent of the insurer, assign to the purchaser his interest in the policy. As previously explained in contracts, a stranger to the agreement can not be substituted without the consent of both parties. Therefore, the consent of the company should always be obtained where there has been an assignment of a policy of insurance.

§ 276. **Kinds of policies.**—There are different kinds of policies. They differ according to the character of the contract. The most common form, as to the amount payable, are either "valued" or "open" policies.

A *valued policy* is one where the amount to be paid in the event of a loss is fixed and named in the policy. Or the agreement may be that the amount to be paid in case of a loss is left open, and is to be determined by the amount of the actual loss, not in excess of the amount stipulated in the policy. This is called an *open policy*.

Marine insurance is generally covered under valued policies; and life and accident insurance is practically always valued. The most common form of fire insurance is covered by open policies. In case of a loss under the latter form of a policy the insurance company will pay that part of the maximum amount stated in the policy which will indemnify the insured. If a building insured for \$5,000 is damaged \$4,000, the entire amount of damages will be paid. If the damage should amount to \$7,000, which is \$2,000 more than it is insured for, only the maximum of the policy, \$5,000, will be paid.

§ 277. **Effect of fraud.**—Fraudulent dealings are fatal to the rights of the party responsible for them. Contracts of insurance require the utmost good faith between the parties to the agreement; their minds must meet without fraud. It is the duty of the party seeking insurance to reveal any circumstances, the concealment of which would be a violation of good faith. The effect of such concealment will render the contract voidable at the election of the injured party. In this respect insurance contracts stand upon a different basis from other contracts. In an ordinary contract one is not obliged to disclose what he knows about the material facts. The rule of *caveat emptor* applies. In insurance it is different. It is therefore essential that an applicant for insurance give correct answers to all questions, supply information and disclose all facts that might reasonably influence an insurance company in determining whether or not to issue a policy.

§ 278. **Representations.**—Representations in relation to insurance are statements made as an inducement to enter into a contract. They are regarded as preliminaries leading up to the making of the agreement, but they are not in themselves a part of it. They are made by the insured with a view of giving information concerning the risk. If the representation is material and false, it will void the policy although innocently made. A representation is material when it is of such a nature as to induce the insurer to take the risk, or to take it at a lower premium than he otherwise would.

Armour applied for additional insurance on a warehouse. In applying for the policy he mistakenly stated there was already \$200,000 insurance on the building; there was, in fact, only \$30,000. The insurance company's liability was thereby greatly increased, as their ratable portion would be less with the larger amount of previous insurance. The representations were material and the plaintiff was prevented from recovering, although he believed his statement was true at the time of making it. (90 N. Y. 450.)

Representations as to beliefs or expectations of a future fact amount only to statements of opinion; they are not material and

the policy will not be void if the events turn out contrary to the expressed belief.

Plaintiff in applying for insurance on his house stated that it was vacant, but would soon be occupied, as he was arranging with a tenant who was to rent and occupy it. This statement was made in good faith, but the building was destroyed by fire before it was occupied. The plaintiff's statement being made in good faith, although he failed to fulfill it, entitled him to recover the insurance. (9 Allen 540.)

§ 279. **Warranties.**—The term warranty, in insurance, is a statement referred to or inserted in and made a part of the policy. The validity of the contract will depend upon the truth made in the representations of warranty. A breach of warranty will render the policy void at the election of the injured party whether it is material or immaterial. If a warranty is false in any particular, whether important or unimportant, the insured can not recover on an insurance contract. In this respect a warranty differs very materially from a misrepresentation, for, as we have seen, the falsity of a representation will not invalidate the policy unless it relates to a material fact.

A breach of a warranty in a sale does not discharge the contract, but gives the injured party a right to recover damages, while in insurance it will terminate the contract itself, and there is no action for damages.

A warranty must be a part of the contract, but the word "warranty" need not be used if the statement or assertion means the same thing. Many of the states have in force statutes providing that a warranty to avoid the policy must be material. The courts also look with disfavor on warranties in insurance contracts on account of the hardships caused by reason of their strict observance. When it is doubtful whether the statement is a representation or a warranty, the courts usually give it the former construction.

A policy of insurance was issued on a stock of goods "contained in the two-story frame house filled in with brick, situated at No. 152 Chatham Street." The house was, in fact, a wooden house with hollow walls not filled in with brick. The court held that the policy was void; that "filled in with brick" was a warranty that had not been complied with by the insured. (6 N. Y. 673.)

§ 280. **The risks.**—Losses by fire include not only damages done by the fire, but also such as result from scorching, smoke, water used in extinguishing the fire, or the efforts of hasty removal of the goods insured to a place of safety. The insurer is liable for loss sustained in blowing up a building to arrest the progress of a fire. If there is no clause in the policy including loss by lightning the insured will not be entitled to indemnity unless a fire resulted from the lightning. The fire must be "hostile", unusual and destructive, and out of its ordinary place. Damage done by a smoking lamp chimney, an overheated stove,

or a pipe-hole that allows smoke to escape from the chimney, is not covered by an ordinary policy.

Insurance covers losses resulting from the carelessness or negligence of the insured. This is true whether the loss is a result of the carelessness of the insured or was caused by the carelessness of others or an inevitable accident. However, if the negligence were so gross as to show an evil intent or misconduct on the part of the insured it would destroy his claim for damages.

A policy of fire insurance can be unmade by expiration, by cancellation, or by forfeiture. A fire insurance policy practically always expires at noon on a day named. It usually stipulates that standard time shall govern. If a fire breaks out just before noon on the day of expiration of the policy the whole of the loss that results is covered thereunder even though most of the damages actually occurs after the hour of noon. The insurer may cancel the policy at any time by giving required notice to that effect and returning unearned premium *prorated*. The insured may also cancel the policy and premiums will be returned based upon short time rate. The policy will be forfeited by an open violation of its prohibitions.

The plaintiff set fire to a quantity of waste paper which he had placed in a stove, with the intention of burning it. The intense heat thus produced caused the soot in the chimney to catch fire, damaging the chimney and otherwise causing loss. This was an unintended fire, and was covered by the policy. (166 Mass. 67.)

The insured attempted to smoke wasps out of a barn (a dangerous undertaking in more respects than one), by thrusting a lighted wisp of hay into the dry timber of the barn, in close proximity to the hay. A fire resulted. While the court held that the negligence of the insured was of an extreme character there was no evidence of bad faith and he was permitted to recover the loss sustained by the fire. (4 Allen 388.)

The insured owned a wooden warehouse in that section of the city where there was a restriction by the municipality against wooden warehouses. A fire destroyed the building. The insurance company sought to prove that the warehouse was worth only \$900 although it was insured for a much larger sum. To replace the building as a warehouse on the same site would, owing to the municipal regulations, cost \$5,000. The court held that the company would be required to pay the latter amount as the measure of loss the insured had suffered. (11 Mich. 425.)

QUESTIONS

Define fire insurance. What does it include?

What is an insurable interest in property? Illustrate various forms of insurable interests. When and for how long must the insurable interest exist?

Define and distinguish (a) open, and (b) valued policies. What is the amount of insurance one may recover under the different forms of policies? May one take out more than one policy on the same piece of property? If one has two or more policies how is the loss adjusted?

What is the effect of fraud in the procuring of insurance of any kind? What is the consequence of concealment? What is the chief difference between a contract of insurance and an ordinary contract? What is the rule in regard to disclosing material facts—voluntarily? When is a representation said to be material?

Secure a fire insurance policy and read the terms upon which it is issued. What provision is made in the policy for protecting (a) the rights of the company? (b) the rights of the insured?

What are the conditions named in the policy under which the insured may use the property?

It is said the premium rates are determined (1) by the use of the building; (2) its surroundings; (3) character of its construction. Explain what is meant by these conditions.

What is (a) representation, (b) warranty as used in an insurance contract? How do these terms differ from their use in a sale? Distinguish between the two terms. What is the consequence of a breach of (a) representation? (b) warranty?

What is included in a fire insurance contract covering the risk?

May one insure his personal property, (a) for more than its actual value? (b) if he does so insure it how much can he collect? (c) upon whom is the "burden of proof" as to its value? (Consult the statutes of your state for the answer to these last questions.)

CASE PROBLEMS

Case problem No. 165.—Manning's house is threatened with fire, but in applying for insurance, he conceals this fact. The house is destroyed by fire. Does the insurance company have a justifiable defense in resisting payment of the loss?

Case problem No. 166.—Doe carelessly set fire to some rubbish on his place which caused his house to be completely destroyed. Can he recover the insurance? Does an insurance policy protect one against carelessness?

Case problem No. 167.—A insures his house for \$2,000.00 in three different companies. The house is worth \$3,000.00. It is completely destroyed by fire. How much will each company be obliged to pay as its share?

Case problem No. 168.—Brown sold his house to Smith. The house was insured in Brown's name. Shortly after the house was sold but before the policy was changed the house was destroyed by fire. Will Smith be entitled to recover on the policy in Brown's name? Will Brown be entitled to collect on the policy?

Case problem No. 169.—Harding insured his house, worth \$10,000, for \$8,000. He had a partial loss, estimated at \$4,000. How much will he be entitled to recover? If the house had been completely destroyed how much could he collect?

CHAPTER XLII.

LIFE INSURANCE.

§ 281. **Definition.**—Life insurance, in its ordinary form, is an agreement upon the part of the insurer to pay a specified sum to a second party, upon the death of the person whose life is insured, in consideration of stipulated payments made to the insurer, called premiums. The one to whom the proceeds are payable is called the beneficiary. The insurance may be payable to the person whose life is insured, to his estate, or to one who may have an insurable interest in the life of the insured.

§ 282. **Kinds of policies.**—The contract of life insurance may take various forms. It is said that more than 400 kinds of policies have been devised and used to promote the business of insurance and to meet the circumstances of the insured. Policies of life insurance most commonly in use, however, are of the following kinds:

(1) **Straight life.**—This kind of a policy provides for a fixed premium to be paid each year during the life of the insured, and at his death a stipulated sum is to be paid to the beneficiary. This is sometimes called old line insurance.

(2) **Term insurance.**—A policy in this class is taken for a stated number of years. The face of the policy is paid only in case of the death of the insured before the expiration of the term. Such a policy is usually issued for a short time, for temporary protection, and is of no value after its expiration.

(3) **Limited payment.**—A limited payment life policy is one which provides for the payment of premiums for ten, fifteen, twenty years, or a longer term, after which all payments cease, the policy being paid in full. At the death of the insured the face amount of the policy will be paid to the designated beneficiary.

(4) **Endowment insurance.**—This is a contract payable to the insured if he is living at the end of a certain number of years, or to a designated beneficiary should he die sooner. Twenty-year endowment policies are the kind most commonly used, although longer or shorter terms may be selected. An endowment policy is presumed to offer an investment as well as protection.

(5) **Annuity insurance.**—An annuity policy provides for paying the insurer a fixed sum in return for which the insured is to receive a yearly income during his life or for a fixed period. If he lives long he gets full value and more, but if he happens to die within a few years he will not get back anything like what was paid. Life insurance is a protection in case of death; an annuity in case of life.

§ 283. **Insurable interest.**—In order to effect a valid insurance contract there must be an insurable interest in the life of the person insured. To have an insurable interest there must be a legal right or a pecuniary advantage or gain from the continuous life of the insured. If one might insure the life of another where such an interest did not exist the former would be more interested in the death of the insured than in his living. This would be considered a wager and against public policy.

Every sane person has an insurable interest in his own life and one may insure his own life in favor of whomever he may choose, whether there is an insurable interest in existence or not. But if the premiums are to be paid by the beneficiary there must be an insurable interest present at the time of the taking out of the policy. However, it need not continue during the life of the insured. In this respect the insurable interest in life insurance is different from that in fire insurance where the interest must exist at the time of the loss, but not necessarily at the time of effecting the insurance. Fraternal insurance companies generally require that the policy must be issued in favor of certain, immediate relatives or those directly dependent upon the member insured.

Husband and wife each have an insurable interest in the life of the other and in their minor children. A sister has an insurable interest in the life of her brother upon whom she is dependent for support, not merely because of blood relationship. A creditor may insure the life of his debtor, but the policy must not be greatly in excess of the debt; if it is too large it will be void on the theory of its being a gambling scheme.

A partner has a like interest in the life of his copartner, and a surety in the life of his principal. A woman has an insurable interest in the life of the man to whom she is engaged.

Harriet Chisholm and Robert Clark were engaged to marry. Harriet took out a life insurance policy on the life of her intended husband. Clark died before they were married and the insurance company refused to pay the policy on the ground that there was no insurable interest. But the court said there was and decided that Miss Chisholm could recover. It was held that if Mr. Clark had lived and failed to keep his agreement she could have sued him for damages for breach of promise; and had they been married she would have been entitled to support. (52 Mo. 213.)

Merely because persons may be closely related does not give one an insurable interest in the life of the other, as for example, one brother in the life of another, an uncle in the life of a nephew, a grandson in the life of his grandmother, or a son-in-law in the life of his mother-in-law.

§ 284. **Warranty, representation, and concealment.**—The principles concerning these topics have already been considered. In an application for life insurance the questions cover more ground and more care must be exercised in attempting to answer them correctly. Accurate answers must be given to questions concerning the applicant's occupation, habits, health, and family history. Material variations from the truth will tend to render the policy void. Statements as to age are material and the answers must be correct.

Beecham took out an insurance policy in favor of his wife. In his application he stated that he did not use alcoholic stimulants. His wife brought an action on the policy. The company defended on the grounds of the intentional

concealment by the insured, that he did drink occasionally. The company contended that if he used alcoholic stimulants to any extent at the time the insurance was made that it rendered his answer false and the policy void. The court ruled that the statement was not a warranty but a representation which was substantially true, and the beneficiary entitled to recover. The courts do not require that the answers be literally true, but substantially correct. (145 Ill. 308; 120 U. S. 183.)

§ 285. **Premium.**—The amount of the premium charged varies with the age of the insured and the character of the insurance policy. Premium rates are usually calculated on a basis of \$1,000.00 of insurance and are based on the probable number of persons of any given age who will die each year. They are all mathematically alike. One kind of a policy will call for a higher yearly payment, or one company's rate may be higher than another's, but in each instance they give proportionately that much more insurance.

By means of tables of vital statistics accumulated through years of experience expert mathematicians have calculated how many persons are likely to live to a specified age. As a result of this study insurance companies have incorporated the results of their computations into what are called mortality tables. The mortality table commonly in use in this country is known as the American Experience Table of Mortality. It begins with 100,000 persons at the age of ten and fixes the limit of life at 96 years, the attained age at which the last three of the original 100,000 will die. This table is prescribed by statute in most of the states as the basis upon which the reserves of life insurance companies shall be computed.

§ 286. **Suicide: Execution: Death in crime.**—Generally the policy provides that the insurer is not liable on the policy if the insured commits suicide. If the policy contains no such stipulation the company will be liable. Many of the states now provide by statute that a clause exempting the company from liability where the insured takes his own life is void unless the party insured contemplated taking his own life at the time of taking out the insurance.

The policy itself may provide that there shall be no recovery if the insured is executed as a felon, and in some jurisdictions there can be no recovery under such circumstances even though the policy may not so stipulate. Nor can there be a recovery where the death of the insured occurred while engaged in the violation of law. This provision is quite common in accident policies. In order that the rule be applied, the loss or death must occur as a direct result of a wrongful act. The mere intent to commit a wrong would not be sufficient to defeat recovery. If one should die of heart failure while on the way to rob a bank it would not void the policy.

SPECIMEN POLICY.

No. 000,000

Organized 1845

The Mutual Benefit Life Insurance Company

Of Newark, New Jersey.

In consideration of the payment of Premiums as hereinafter provided, hereby insures the Life of John Jones of Newark in the County of Essex State of New Jersey (herein called the Insured) in the sum of Ten thousand Dollars, for the term of Life, payable at its office in Newark, New Jersey, to

Insured.
Amount.
When, Where and to Whom Payable.

the executors, administrators or assigns of the Insured, immediately upon receipt of due proof of the death of the Insured. Any error made in stating the age of the Insured will be adjusted by paying such amount as the Premiums paid would purchase at the correct age. Any indebtedness to the Company on this Policy and any unpaid instalments of the then current year's Premium will be deducted from the sum insured.

Premium. The Annual Premium of Three hundred and sixty-two Dollars and twenty Cents, will be payable by the Insured on delivery hereof and on the first day of January in each year at the Company's office in Newark, New Jersey, or to Agents in exchange for receipts signed by the President or Treasurer, until Twenty full years' Premiums shall have been paid, or until the death of the Insured, should that event sooner occur. In lieu of the Annual Premium the Company will accept One hundred and eighty-four Dollars and twenty Cents Semi-annually in advance, or Ninety-four Dollars and twenty Cents Quarter-annually in advance. This Policy will not take effect unless the first Premium or agreed instalment thereof shall be actually paid during the lifetime of the Insured.

Assignment. No Assignment of this Policy shall affect the Company until it shall have received written notice thereof.

Agents. Agents are not authorized to make, alter or discharge contracts.

Incontestability. If within one year the Insured shall commit suicide, while sane or insane, this Policy will be null and void. This Policy will be incontestable after one year from its date of issue except for non-payment of Premium.

The Provisions and Agreements printed on the second and third pages hereof are a part of this contract.

IN WITNESS WHEREOF, The Mutual Benefit Life Insurance Company has, by its President and Secretary, signed this contract at the City of Newark, in the State of New Jersey, this first day of January one thousand nine hundred and ten

Examined

Age 35

J. William Johnson

Secretary.

Fred K. Frelinghuysen

President.

Attest:

Lewis O. Harrington

Registrar.

Whole Life Policy. Premiums Payable for 20 Years.
Dividends Annually beginning with 2d policy year as provided herein.
Form 4—Self.

American Experience Table of Mortality

AGE	Number Living	Number Dying	Expec- tation of Life	AGE	Number Living	Number Dying	Expec- tation of Life	AGE	Number Living	Number Dying	Expec- tation of Life
10	100,000	749	48.72	39	78,862	756	28.90	68	43,133	2,243	9.47
11	99,251	746	48.08	40	78,106	765	28.18	69	40,890	2,321	8.97
12	98,505	743	47.45	41	77,341	774	27.45	70	38,569	2,391	8.48
13	97,762	740	46.80	42	76,567	785	26.72	71	36,178	2,448	8.00
14	97,022	737	46.16	43	75,782	797	26.00	72	33,730	2,487	7.55
15	96,285	735	45.50	44	74,985	812	25.27	73	31,243	2,505	7.11
16	95,550	732	44.85	45	74,173	828	24.54	74	28,738	2,501	6.68
17	94,818	729	44.19	46	73,345	848	23.81	75	26,237	2,476	6.27
18	94,089	727	43.53	47	72,497	870	23.08	76	23,701	2,431	5.88
19	93,362	725	42.87	48	71,627	896	22.36	77	21,330	2,369	5.49
20	92,637	723	42.20	49	70,731	927	21.63	78	18,901	2,291	5.11
21	91,914	722	41.53	50	69,804	962	20.91	79	16,670	2,196	4.74
22	91,192	721	40.85	51	68,842	1,001	20.20	80	14,474	2,091	4.39
23	90,471	720	40.17	52	67,841	1,044	19.49	81	12,383	1,964	4.05
24	89,751	719	39.49	53	66,797	1,091	18.79	82	10,419	1,816	3.71
25	89,032	718	38.81	54	65,706	1,143	18.09	83	8,603	1,648	3.39
26	88,314	718	38.12	55	64,563	1,199	17.40	84	6,955	1,470	3.08
27	87,596	718	37.43	56	63,364	1,260	16.72	85	5,485	1,292	2.77
28	86,878	718	36.73	57	62,104	1,325	16.05	86	4,193	1,114	2.47
29	86,160	719	36.03	58	60,779	1,394	15.39	87	3,079	933	2.18
30	85,441	720	35.33	59	59,385	1,468	14.74	88	2,146	744	1.91
31	84,721	721	34.63	60	57,917	1,546	14.10	89	1,402	555	1.66
32	84,000	723	33.92	61	56,371	1,628	13.47	90	847	385	1.42
33	83,277	726	33.21	62	54,743	1,713	12.86	91	462	246	1.19
34	82,551	729	32.50	63	53,039	1,800	12.26	92	216	137	.98
35	81,822	732	31.78	64	51,230	1,889	11.67	93	79	58	.80
36	81,090	737	31.07	65	49,347	1,980	11.10	94	21	18	.64
37	80,353	742	30.35	66	47,361	2,070	10.54	95	3	3	.50
38	79,611	749	29.62	67	45,291	2,158	10.00				

QUESTIONS

In its ordinary form what is Life Insurance? Define and illustrate the following most common form of life insurance policies: (1) Term insurance; (2) Limited payment; (3) Endowment; (4) Annuity insurance.

It is said that life insurance is a protection in case of death, while annuity insurance is protection in case of life. Explain the meaning of this statement.

In what respect does an insurable interest in life insurance differ from that of fire insurance? Give several illustrations of those having (a) an insurable interest; and (b) those who do not have such an interest. Does one have an insurable interest in his own life? What is the theory upon which the necessity for having an insurable interest is based?

What is the effect of concealment upon an application for life insurance? What about a misrepresentation?

What are the elements that determine the amount of premium charged for the different kinds of policies? What is a mortality table? What is its particular use to an insurance company?

CASE PROBLEMS

Case problem No. 170.—Mr. Robert Lane was killed in an automobile accident. Soon after his death three suits were filed against three insurance companies by three policy holders upon the life of Mr. Lane. The first policy was held by Mr. Curtis for \$10,000. At the time the policy was issued Lane owed Curtis \$4,000 and at the time of Lane's death none of it had been paid. Another policy was in favor of Hannah Doe, who was engaged to Lane at the time of his death. The third policy was held by Mr. Lane's sister, who had always lived with her brother, and was entirely dependent upon him for her support. Which, if any of these suits will prove successful, and why? (90 Calif. Rep. 245; 52 Mo. 213.)

Case problem No. 171.—James Doolittle owes Jacob Styles \$2,000.00, and having no security Styles decides to insure Doolittle's life for this amount. May Styles do so? If Doolittle should later pay the debt will this cancel the insurance or may Styles still carry it?

CHAPTER XLIII.

REAL PROPERTY.

General Nature and Classification.

§ 287. **Meaning of the term property.**—Property includes whatever the law permits a man to possess, to enjoy, and to dispose of, to the exclusion of others. While nearly everything in the material world may be owned by individuals, the air, the seas, and running water are some of the things excluded from private ownership, although one may have the right to enjoy them temporarily. Wild animals not in captivity are not considered as property.

All property susceptible of ownership is divided into two general classes: (1) real property or realty, and (2) personal property or personalty. These distinctions are arbitrary and technical, but important.

The names "real property" and "personal property" were not originally selected as descriptive terms of the things included in each class, but are derived from Latin names, *actio realis* and *actio personalis*, applied in early times to the different kind of actions resorted to by one who had been deprived of these different classes of property. If one could recover the real thing sued for—the land itself—he used what was termed a "real action," and as the real action was brought for property in land only, real property became the name of property interests in land, except leaseholds and liens. When the action would result in the recovery of only the money value of the thing sued for—and not in the specific property, as cattle or goods—the action was in effect against the person, and was known as a "personal action;" and the name personal property was used to designate the kind of property concerning which the action was brought.

Real property descends at once to the heirs of the owner upon his death unless disposed of by will; personal property goes at once to the executor or administrator, whether there is a will or not, to pay the debts of the estate, and the remainder, if any, is distributed among the next of kin of the deceased owner.

§ 288. **Things considered as real property.**—Real property includes the soil, and is said to consist of *lands*, *tenements*, and *hereditaments*. The term hereditament includes everything that can be inherited; that is, everything that would go to the heir upon the death of an ancestor. Heirlooms were considered hereditaments under the English law, but they are not so considered in the United States. The technical meaning of tenements does not relate to a building rented to tenants, but pertains to whatever may be classed as a right of way over the land of another, and the like.

The owner of the bank of a river, where the tide does not ebb and flow.

has the exclusive right of fishery to the thread of the stream; but the right to fish may be regulated by law with a view to the protection of the rights of others.

In the case of large rivers, navigable by sea-going vessels, there is no exclusive right of fishery in the adjoining landowners, but that right is in the public at large. Where the public have such a right no one can lawfully go upon the land of another for the purpose of taking fish, without consent.

Land includes whatever is above or beneath the surface of the earth, or as the old phrase ran, "whoever owns the surface owns everything up to the sky and everything down to the center of the earth." It embraces the soil and everything upon it, and everything attached to it, whether naturally as trees, grass, and water; or artificially as buildings, fences, and other permanent structures. It also includes mines, quarries, mineral lodes, oils, and gases; and a conveyance of land as such carries with it all these things.

Natural crops, such as grain and vegetables, are for some purposes and under some circumstances regarded as personal property. But a conveyance of land without a reservation of the growing crop, planted by the owner, passes the title to the crop. If the crop has been severed from the land, but has not been removed, it will not go to the purchaser of the land.

Trees planted by a nurseryman, upon land leased for the purpose of growing them for the market, are deemed personalty.

A rosebush in the yard will pass by the deed of the realty. Trees fallen to the earth or cut down and lying on the land are still a part of it; but if hewn or cut for sale, or fuel, they are not so considered. Fences go with the real estate, but rails piled up are personal property.

§ 289. **Ownership of trees.**—The owner of the land owns the trees upon it. If the branches of a tree extend over the line of an adjoining proprietor, the latter may cut off every bough or twig; he may even dig into the earth and remove every root that comes into his land. When these projecting roots and branches have been removed they, and the fruit from them, belong to the one upon whose land the trunk of the tree stands. The tree, and its product, is the sole property of him on whose land the trunk of the tree is situated, and as such he is entitled to its product; he may enter upon the land where it lies to gather it and carry it away. The location of the trunk as it appears above the surface of the earth determines the ownership of the entire tree. When a tree stands on the boundary line it is the joint property of both, and neither can remove or injure it without the consent of the other.

§ 290. **Water rights.**—The owner of land adjoining a stream, not navigable, is the owner of the soil to the center line of the river. Where the river is described as a boundary, the law will construe the grant as extending to the center of the river. The proprietor whose title extends to the middle of the stream has

no title to the water. He has a right to make a reasonable use of it for his land, stock, or house, while passing over his land; but he must not, in any substantial way, diminish or impair the right of use by a lower or other proprietor, as it passes along his land. He may change its course on his own property, but he must not divert it so as to cause it to enter into his neighbor's land elsewhere than its natural channel. When the water is congealed into ice and is attached to the soil it is considered a part of the real estate, and the owner of the land has a right to prevent its removal by another.

Courts will enjoin the continued wrongful diversion of a watercourse, though the complainant has suffered no material damage thereby, as otherwise the diversion might ripen into a prescriptive right. (232 Pa. St. 639.)

A river is not navigable, when it can not be navigated profitably for commercial purposes ascending, and can only be used descending for the transportation of logs and rafts for short periods, during floods, ten or twelve days in each year. (124 Tenn. 293.)

QUESTIONS

What is included in the term "property?" Mention several things excluded from ownership. Give the theory of the origin of the words used in the terms "real property" and "personal property." What disposition in a general way does the law make of the two classes of property?

What is included in the term real property? What is meant by hereditament? What is the technical explanation of the word tenement?

What is included under the general term of **lands**, aside from the surface? When are trees considered real property and when personal property? What determines (a) the ownership of trees, (b) the fruit on the trees?

Explain fully the rights the owner has of land to running water (a) passing over his land, (b) adjoining his land.

CASE PROBLEMS

Case problem No. 172.—A—— and B—— were the owners of adjoining land separated by a fence. A fruit tree on the land of A—— had overhanging branches. B—— was plucking some of the fruit from the branches hanging on his side of the fence. A—— ordered B—— to desist. B—— refused and a fight resulted. B—— claimed that the ownership of land included everything above the surface, and that he had a right to the fruit on his side of the fence. What are B——'s rights? (48 N. Y. 201.)

Case problem No. 173.—Adams owns 160 acres of land. The land is fenced; on part of it there are growing trees and part is planted in corn and wheat. He has a house, barn, animals and machinery. In the milk house there is a cream separator firmly attached to the floor. In the house there is a hot air furnace. Under the ground is a coal mine. Adams constructs a shaft for the purpose of mining coal. Make a list of the items classified as real property and personal property on this farm.

CHAPTER XLIV.

ESTATES IN LAND.

§ 291. **Estates classified.**—Frequently the term estate is used to denote the whole of a man's proprietary rights or belongings. But the strict technical meaning is the interest which a person has in land.

Different persons may have different interests in the same tract of land. One person may be entitled to the immediate use and enjoyment of it while another may own the postponed right of possession and enjoyment, which is not to begin until the termination of the first holder's right. These various estates are designated by different names dependent upon the nature of the interest held; only the most common will be here considered.

Estates are divided into two general classes: (1) *Estates of freehold*, and (2) *estates less than freehold*.

(1) *A freehold estate* is one for an uncertain period, and which must or might continue during the life of some person. It may be for a lifetime or it may be forever. The term freehold is of ancient origin and formerly applied to the possession of the soil by a freeman: a freeman was permitted to go where he pleased. The early meaning of the word has lost its significance and it is not part of our law, as all men are considered free. The most common illustration of a freehold is an estate in *fee simple*.

(2) *Estates less than freehold* are estates for years, estates at will, estates from year to year, and the like.

§ 292. **Fee simple.**—An estate in fee simple is the highest form known to the law. For all practical purposes it is an absolute ownership in land, without condition or qualification. In the event of the owner's death the land will descend to his heirs unless otherwise disposed of by will. Lands held in fee simple are subject to the debts of the owner after death as well as during life. Among the incidents of a fee simple are:

First. The right of curtesy.

Second. The right of dower.

Third. The right of eminent domain.

Fourth. The right of alienation and devise.

Under the common law there are two methods of acquiring and losing title to real property: (1) by descent, which is the means by which one on the death of an ancestor acquires his estate, as his heir; and (2) by purchase, where the title is vested in him by his own act.

The term purchase in this connection includes acquiring title (a) by escheat, (b) by occupancy, (c) by prescription, (d) by forfeiture, and (e) by alienation. Alienation is explained in the following chapter; a glossary should be consulted for the meaning of the other terms.

§ 293. **Curtesy.**—An estate by the curtesy is the interest which a husband has during the rest of his life, upon the death of the wife, in the lands of which the wife was seized in fee simple, at any time during their marriage. Three conditions are necessary to create this estate: (1) There must have been a lawful marriage. (2) There must have been seizen (ownership) of the land in the wife. (3) There must have been a child born alive and capable of inheriting the property, although the child may have died immediately after its birth.

The husband may release his right of curtesy by joining in the deed with his wife conveying the title of the land to someone else. Curtesy exists in many of the states; in some it is abolished or greatly modified. Upon the death of the husband the children receive the estate.

§ 294. **Dower.**—The provisions which the law makes for the use of the widow during her life out of the lands of the husband is termed *dower*. (There is no dower in personal property.) Under the common law the widow is entitled to one-third interest in all the real property which the husband was seized of during their marriage. Dower is sometimes called the "widow's third." To entitle the wife to dower, the marriage must have been a legal one.

The husband can not deprive his wife of this right of dower by a transfer of title to the property. The only way the wife can be dispossessed of her right is by joining with her husband in the deed making the conveyance of the property. If she does not thus release her right she can claim dower, if she survives her husband.

As in curtesy many of the states have abolished or changed the common law right of dower and have provided the widow with other property rights in the estate of her husband at his death, which she may own and dispose of as she pleases.

§ 295. **Right of eminent domain.**—All real estate, in this country, is held subject to the *right of eminent domain*. This is the right or power of the state to appropriate private property to particular uses for the purpose of promoting the general welfare. By this means the property of an individual is taken without his consent, and it may be in spite of his opposition, for the purpose of being devoted to the particular use of the state itself, or some person or corporation by authority of the state. The property is not confiscated. The owner is entitled to receive just

compensation. If the amount can not be determined by agreement a trial is held and a jury will make the award.

The use for which the property is taken must be a public use, one in whose accomplishment the public is interested. Instances of such are lands for streets and highways, public parks and buildings, irrigation of arid land, railroad right of way and terminal and switching facilities, telephone and telegraph lines.

This right is not exercised for improving private estates, or building private roadways. It must be a public necessity.

Eminent domain is the authority which a state has over private property for the public benefit, public safety, or whenever the convenience or welfare of the public may require it. A franchise, like any other kind of property may be taken away in whole or in part by means of this power in the state.

The state of Vermont granted the West River Bridge Company the exclusive right to erect and maintain a bridge over a river. At a subsequent session of the legislature an act was passed which provided for condemning property for highways. Under this statute the authorities took the bridge belonging to the West River Bridge Company after assessing compensation, and made it a free public highway.

The company contended that this proceeding impaired the obligation of a contract (see § 53) and endeavored to have the entire matter set aside. The court held that a charter was a contract but it was subject to the right of eminent domain in the state, and the company had no legal complaint. (6 Howard 507.)

QUESTIONS

What is the general and also the technical meaning of the word estate? Is a store building real estate?

What is a freehold estate? What is the early meaning of the word freehold?

What is meant by fee simple? Give an illustration of a fee simple title. Name some of the incidents of a freehold estate.

What is an estate by **curtesy**? What are the conditions upon which such an estate is created? How may the husband relinquish his right of curtesy? Does curtesy exist in your state?

What is meant by **dower**? In what kind of property does it exist? In what way can the wife be deprived of dower? Does dower exist in your state?

Explain the meaning of the right of **eminent domain**. For what use may property be taken? How is the value of the property taken determined?

CHAPTER XLV.

CONVEYANCE OF REAL PROPERTY.

§ 296. **Alienation.**—The transfer or conveyance of real estate from one person to another is, in law, termed *alienation*. Alienation may be by deed or it may be by *devise*, which is the word used when it is transferred by a last will and testament. But first let us learn how title or ownership in land is acquired.

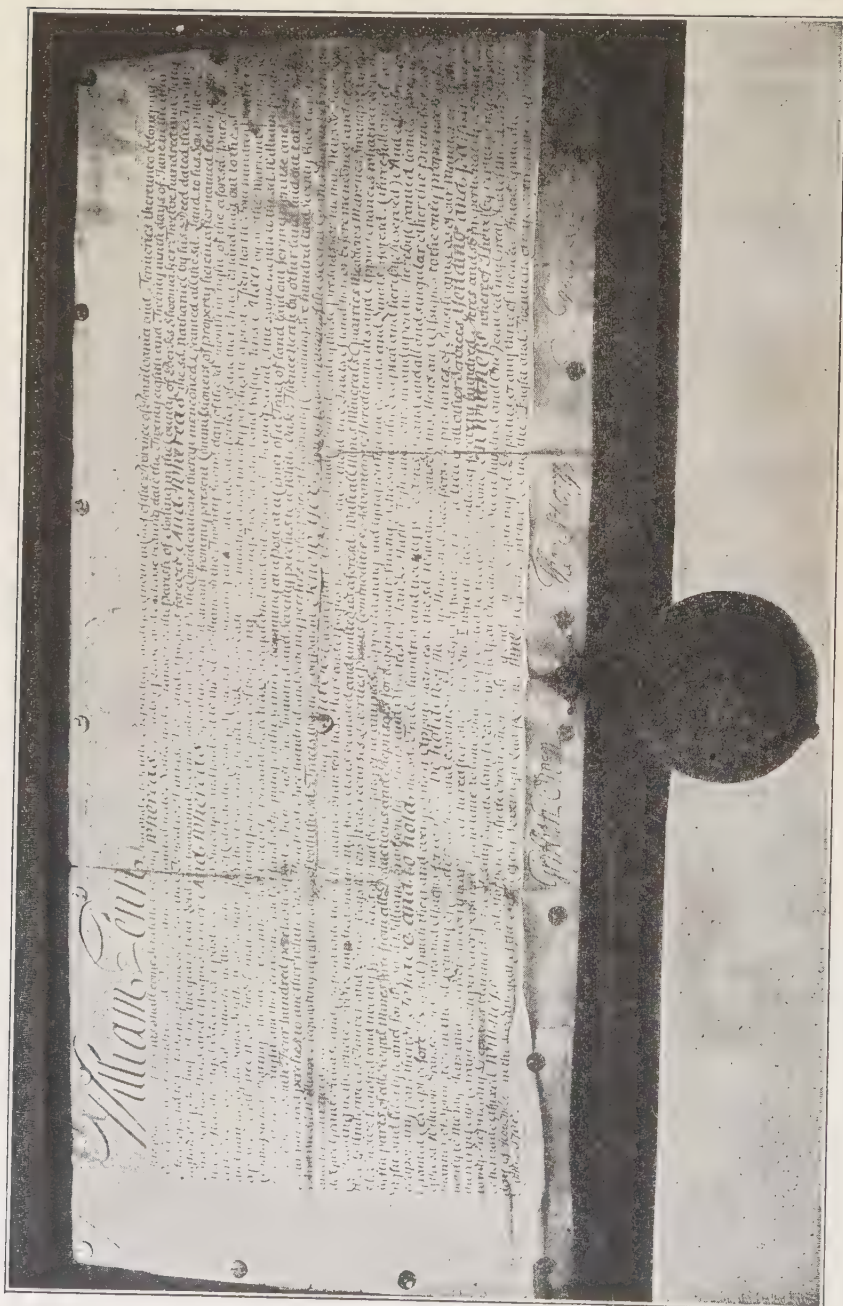
§ 297. **Titles to land.**—Originally all private titles to land in this country were derived (a) from grants to the states; (b) from the federal government; or (c) from royal grants prior to the revolution. For instance, in Texas titles are derived from the state because the state owned the land at the time it was annexed to the United States. In Missouri titles are derived from the federal government; and in some of the far eastern states from royal grants made before the revolution. A government derives its title by discovery, by conquest, and by purchase.

§ 298. **Deeds.**—When a person buys real estate he receives from the grantor a deed. A deed is a written instrument by which title to lands or an interest in property has been conveyed from the seller to the purchaser. (The word deed literally means something done.) The one making the deed or selling the property is called the grantor and the one to whom the deed is made or the purchaser is called the grantee. By statutes and usage, land can not be transferred except by a deed which should be (a) signed, (b) sealed, (c) acknowledged, (d) delivered, and (e) recorded. As before stated private seals have been abolished in many of the states.

§ 299. **Agreement to purchase.**—After making an oral bargain to purchase land there is frequently a delay preparatory to the execution and delivery of the deed. To enforce this agreement the oral bargain must be put in writing to comply with the Statute of Frauds.

This written instrument is usually in the form of a *land contract* and provides for the conveyance of the property at some future time. It must be understood that the contract does not pass the title; a deed is necessary to do that. If a deed is executed at the time of the making of the bargain, no "land contract" would be necessary—the deed itself would be the contract.

The memorandum need not consist of any particular form of words, although it is best to have a formal document. Usually



DEED BY WILLIAM PENN.
Photographic reproduction of a deed made by William Penn to 1,250 acres of land in Pennsylvania.
The seal is of pure beeswax.

printed forms are provided which comply with the legal requirements of the statutes in such matters. The agreement should be signed by both parties to the contract.

A telegram, a letter, or a series of letters by which the terms of the agreement can be ascertained, will satisfy the law. The contract to be binding need not be acknowledged, but unless acknowledged it can not be recorded.

§ 300. **Abstracts of title.**—Before a deed is accepted from the seller the purchaser should be satisfied that the title to the property is good and free from all encumbrances. To this end he should require the seller to furnish an *abstract of title*—that is to say, a history of the title. An abstract of title is a condensed memorandum taken from the records, consisting of a synopsis or summary of all the conveyances which in any manner may affect the land or the title to it. The title should then be examined by some competent attorney familiar with the laws of the state in which the lands are situated. The laws of the state in which the land is located govern its conveyance.

Land Contract.

THIS CONTRACT WITNESSETH, That Peter Sterling of the county of Buena Vista, state of Iowa, has bargained and sold to Richard Roe of the county of Buena Vista, state of Iowa, for eight thousand (\$8000.00) no/100 dollars the following described real estate in the county of Buena Vista, state of Iowa, to wit: The south-east quarter (S. E. 1/4) of section thirty-one (31), Township thirty-five (35) and range thirteen (13).

Of the purchase price one hundred (\$100.00) no/100 dollars has been paid and is deposited with John Doe, agent for the seller, and the balance payable as follows: Three thousand nine hundred (\$3900.00) no/100 dollars on the first day of May, 1921, and four thousand (\$4000.00) on/100 dollars on the first day of May, 1922.

The seller agrees to furnish, within ten (10) days from date hereof, at the office of his agent making this sale, a complete abstract of title to the property, certified by competent abstractors from the U. S. Government to this date, including certificates in full, as to taxes, judgments or other liens.

The buyer to have twenty (20) days for the examination of the abstract and report to the seller any defects in the title. If the title is found to be defective, the seller agrees to have the same rectified within a reasonable time which is not to exceed thirty (30) days from the date of written notice of such defects;

but in case such defects in the title be not remedied within that period, and no extension of time is had between the parties hereto, this contract shall be null and void, and the money deposited aforesaid shall be returned to the buyer, and the abstract to the seller.

If, after such correction (if any required) as seller shall be able to make, it is found that the seller has a good title in fee to the property he agrees upon the receipt of the remainder of the full consideration as hereinbefore set forth to deliver to the buyer, or order, a good and sufficient Deed thereto, duly executed, conveying good title to the property, free and clear of all taxes and encumbrances whatsoever now thereupon, except state and county taxes for the year 1922 and thereafter.

If upon such delivery of deed or tender thereof, the buyer fails to comply herewith on his part by paying or delivering as hereinbefore stipulated, the remainder of the purchase price or consideration, the money deposited as aforesaid shall be forfeited by the buyer; and upon such forfeiture, this contract may or may not be thereafter operative at the option of the seller.

Unless otherwise stated herein, the income from the property is to go to the buyer pro rata for every day after May first, 1921, and mortgage notes given in part consideration shall bear interest after May first, 1921,

Time is of the essence of this contract.

IN WITNESS WHEREOF, The said parties have hereunto set their hands this eighth day of March, 1921.

Executed in duplicate.

PETER STERLING.
RICHARD ROE.

§ 301. **Title guarantee companies.**—In the larger cities there are guaranty or trust companies whose business is insuring titles. These companies issue policies and by the terms of their contract they engage to become responsible for the title and to defend any litigation that may be instituted against it.

§ 302. **Principal kinds of deeds.**—There are various kinds of deeds; they are not all alike. The two principal kinds are *quitclaim deeds* and *warranty deeds*. The purchaser should be sure that he is getting a good deed and the right kind before he accepts it.

A quitclaim deed simply conveys any interest which the grantor may have in the property and nothing more. The grantee takes

all the risk as to whether there is a good title to the property, or any title at all, but whatever there is, he gets.

A warranty deed not only conveys to the grantee all the right and title of the grantor, but it contains in addition what are called covenants of warranty.

§ 303. **Parts of a deed.**—Unless the statutes provide otherwise the component parts of a deed are:

(1) *The date.* Although the date is not essential to its validity, a deed takes effect from its delivery. The date may be either at the beginning of the deed or at the end.

(2) *The names of the grantor and the grantee.* The names should be written in full, and not the initials. It is also usual to insert the residence of both parties.

(3) *The consideration.* The specific amount of money need not be stated. It may in reality be more or less than the amount recited in the deed.

(4) *The words of conveyance.* The language varies in different kinds of deeds. The usual words are grant, bargain, and sell; or they may be grant, bargain, sell and convey. These words take the place of the ordinary covenants of warranty.

(5) *Description of the property.* It may be by lots and blocks or by metes and bounds. But it is important that it clearly and accurately describes the premises intended to be conveyed. It sometimes happens that the property mentioned is located miles away from the place where it was thought to be.

(6) *A statement of the estate granted,* usually, but not always begins with the words "To have and to hold."

(7) *Conditions or reservations, if any.* Restricting the property to a certain use would be an illustration.

(8) *Warranties.*—A warranty deed usually comments that the grantor is lawfully seized (possessed) and has a right to convey; that there are no encumbrances; and that the grantee shall have quiet enjoyment and peaceable possession, and the grantor will warrant against all lawful claims. These promises are implied in some states by the phrase grant, bargain, and sell, or similar words.

(9) *Conclusion or testimonial clause,* as "in witness we have hereunto set our hands and seal, etc."

(10) *Formal acknowledgment* before an officer of the execution of the instrument.

§ 304. **Signed.**—After the deed is properly drawn it should be signed by the grantor writing his name in the usual way at the place provided for the signature. If the grantor is a married

man the wife's signature should be written below that of the husband. In some states the signature must be attested by a subscribing witness or witnesses. In case the grantor should be unable to write his name, he may execute the deed by making a mark or cross, as follows:

John Brown
Witness to the
mark of Richard Roe.

Richard $\left\{ \begin{array}{c} \text{His} \\ \text{X} \\ \text{Mark} \end{array} \right\}$ Roe

§ 305. **Acknowledgment.**—In most jurisdictions the law requires a formal acknowledgment of the deed before a notary public or some other public official authorized to take such acknowledgments. This is done by the grantor appearing before the officer and presenting the deed of the former. The one taking the acknowledgment writes a certificate to that effect on the deed at the place provided and affixes his official signature and seal. As between the grantor and the grantee a deed is generally valid although not acknowledged, but to permit it to be recorded it must be acknowledged. The acknowledgment should be in the form provided by the statutes of the state where the land is situated.

§ 306. **Delivery.**—A deed must be delivered to the grantee to be effective. No particular form of delivery is necessary. The grantor must by acts or words relinquish his control of the deed and the grantee must accept it. This may be done by the grantor's intention to deliver the deed, by his handing it direct to the grantee or through an agent, or he can direct the grantee to take the deed by picking it up from the table.

Sometimes deeds are placed in the hands of disinterested third persons to be delivered to the grantee on the performance of some act or the fulfillment of some condition. A deed thus delivered is said to be in *escrow*. It has no effect until the performance of the condition. After a deed is once delivered the title immediately vests in the grantee.

§ 307. **Recording.**—As soon as the deed is delivered it should be recorded in the public register of the county in which the land lies. The recording of a deed is public notice of the conveyance and was adopted for the purpose of giving information to whomever it might concern. If the grantee neglects to record the deed and the grantor should be dishonest, he might deed the same property to someone else and if the second grantee record his deed first, the first grantee would be defrauded of his title. Then again, if the grantee fails to record the deed and if creditors bring suit against the grantor the purchaser may be caused a great deal of trouble and worry. If the original deed is lost a certified copy of the record can be obtained.

WARRANTY DEED FORM.

Know all men by these presents:

That Peter Sterling and Louise Sterling, his wife
 in consideration of Two Thousand (2,000) Dollars
 to them paid by Thomas Timmons
 the receipt whereof is hereby acknowledged, do hereby Grant, Bargain, Sell
 and Convey to the said Thomas Timmons
 his heirs, ~~executors~~ and assigns forever.

Lot thirty-two (32) block six (6) in Oxford Park, an addition in
 the city of Dayton, County of Montgomery and State of Ohio, as
 per recorded plat thereof.

and all the Estate, Title and Interest of the said Grantors
 either in Law or Equity, of, in and to the said premises; **Together** with all the privileges
 and appurtenances to the same belonging, and all the rents, issues and profits thereof;
 To have and to hold the same to the only proper use of the said Grantee
his heirs, ~~executors~~ and assigns forever.

And the said Peter Sterling and Louise Sterling
 for themselves and their heirs, executors and administrators,
~~executors~~ do hereby **Covenant** with the said Thomas Timmons
his heirs, ~~executors~~ and assigns,
 that they are the true and lawful owners of the said premises,
 and have full power to convey the same; and that the title so conveyed is **Clear, Free**
and Unincumbered; And further, That they do **Warrant and Will Defend**
 the same against all claim or claims, of all persons whomsoever;

In Witness Whereof, The said Peter Sterling and Louise Sterling
 who hereby release all their right and expectancy of **Dower** in the said premises,
 have hereunto set their hands this
twenty-second day of August in the year
 of our Lord one thousand nine hundred and **fifteen.**

Signed and acknowledged in presence of—

E. J. Krenn
W. O. Crosswhite

Peter Sterling
Louise Sterling

Acknowledgment appearing on the back of deed:

State of Ohio County of Montgomery, ss.

Be it Remembered, That on this twenty-second day
of August, in the year of our Lord one thousand nine
hundred and fifteen, before me, the subscriber, a
Notary Public in and for said county, personally came

Peter Sterling and Louise Sterling

the grantors in the foregoing Deed, and acknowledged the signing
thereof to be their voluntary act and deed

In Testimony Whereof, I have hereunto subscribed
my name and affixed my official seal
on the day and year last aforesaid.

[SEAL]

Peter Barton
Notary Public

An acknowledgement of a deed or other legal instrument is the act of one who has executed it, in going before some competent officer or court, and declaring it to be his act or deed. The acknowledgment is certified by the officer or court; and the term "acknowledgment" is sometimes used to designate the certificate.

All conveyances of real estate should be properly acknowledged according to law in force at the time of the acknowledgment, in order that the title may be perfect, in the strict sense of the word. It has been held that a deed made by a married woman, and acknowledged before an officer who had no authority to take acknowledgments, was not sufficient to pass her title. (63 S. W. 698.)

The statutes of each state prescribe the necessary formalities to entitle an instrument to be recorded, and what shall be the effect of the record as to notice and evidence. These laws are not uniform in the different states.

Every properly executed and acknowledged instrument is considered as recorded as soon as it is in the hands of the recording officer. He notes upon it the day, the hour, and the minute when it was received by him.

The Torrens System.—The purpose of what is known as the Torrens system of registration and transfer of title to real estate is to free land title of the expense of conveyance, the perils that attend real estate transactions, and the expense of investigating chains of title back through former owners. The plan was devised by Sir Robert R. Torrens, premier of South Australia in 1857, from whom it gained the name, the "Torrens system." It was generally adopted throughout Australia, and many other English speaking countries. Modifications are in use in several European countries. In the United States it was first adopted in Illinois, and in varying form is now used in several of the states.

The Torrens system is a method by which all interests in land are transferred by the examination, certification, and registration of titles, and a guarantee of title is given to protect the purchaser. The state first investigates the title and takes the necessary steps to cure any defects that may exist. When this is completed there is issued a certificate stating that the owner has an indefeasible title to the land. Whenever a transfer takes place thereafter entry is made by the proper official. If the property is divided the old certificate is canceled and new ones are issued in its place. The property can not be sold, mortgaged, nor any interest assigned, without presenting the title certificate to the registrar together with the deed, mortgage, or contract.

QUESTIONS

Explain the meaning of the word **alienation**. How are private titles to land derived? How does a government acquire title?

What is a deed and its purpose? How does it differ from an agreement to sell? Can real property be transferred from one to another without a deed? Can personal property? Give the requisite elements in a deed for the conveyance of real estate. In what respect does a "land contract" differ from a deed? What is an abstract of title?

What is the distinction between a warranty deed, and a quit claim deed with relation to the obligation assumed by the grantor? What are the component parts of a deed?

How is a deed acknowledged? What reason can you give why a conveyance should be (a) acknowledged, (b) recorded?

By whom should a deed be signed? When does the title in real property pass? How is delivery made? What is a delivery in escrow?

What is the purpose of the Torrens system of land registration?

CASE PROBLEMS

Case problem No. 174.—Jones was the owner of a farm which he conveyed to Smith by warranty deed. Smith immediately moved his family upon the land and remained in possession, but did not attempt to record his deed. Sometime thereafter Jones presented to Brown an abstract showing title in Jones to this land. Relying upon the records, Brown bought the land from Jones. Immediately upon receipt of his deed Brown filed it for record. Afterwards Brown brought suit against Smith for possession of the land. Who is entitled to the land and why?

Case problem No. 175.—Fox executed a deed to his farm in favor of his son, as grantee. He then placed the deed in a safe deposit vault where it remained until Fox's death. When the deed was found the son claimed title to the property. What is the result?

Case problem No. 176.—If after executing the foregoing deed Fox had given it to his lawyer for safe keeping with instructions to deliver it to the son upon the grantor's death what would your answer be? (67 Miss. 511.)

Case problem No. 177.—Adams owned a tract of 40 acres of timber land. He felled sufficient of the timber and split it into rails to fence the land. He laid the rails into a fence on three sides of the land, the rails for fencing the other side being piled on the land. In this situation he sold the land to Brown who took possession. The next day Adams demanded of Brown the rails in the fence and those piled on the land, claiming they were personal property and did not pass with the land. Brown refused to deliver any of them. Adams brought suit for the value of the rails. What should be the judgment of the court?

CHAPTER XLVI.

DEVISE, JOINT TENANTS, AND ADVERSE POSSESSION.

§ 308: **Wills.**—Title to land may be transferred by a *will*. A will, when used in a legal sense, is an instrument by means of which a person provides for the disposition of his property to take effect after his death. The person making the will is called the testator; if the gift is real estate, the beneficiary is called the devisee; if personal property, the legatee. One may dispose of his property as he wishes except that a widow can not be deprived by a will of her right of dower.

Any person of sound mind and the proper age may make a will. In some states and under certain circumstances minors may make wills. Under the common law a married woman could not make a will, but most of the states now permit her to do so.

The various states have different laws respecting the capacity to make a will. The majority require the testator to be twenty-one years of age, and of sound mind, to dispose of real or personal property.

The soundness of mind referred to means: Does the testator have sufficient mind and memory to know the condition, extent, and value of his property? Does he understand his relationship to the natural objects of his bounty—that is, to what extent they deserve his gifts?

§ 309. **Formalities.**—The essential formalities necessary for the making of a will are usually as follows:

(1) The will must be in writing to pass title to real estate. No particular form is necessary and any words that convey the intention of the testator will be sufficient. Technical words should be avoided if the meaning can be made clear without them. It is essential that the will should conform in every detail to the requirements of the statutes in that state where the property is situated.

(2) The will must be signed at the end by the testator, or by someone for him in his presence and at his express direction. If the testator can not write, "his mark" will be sufficient.

The first most necessary requirement for the proper execution of a will is that it be signed by the testator at the end of the will. This rule is imperative and inflexible. It does not mean the middle or near the end, but on the contrary, the actual physical end of the will.

(3) The will must be attested by a legal number of witnesses, not less than two, the number being dependent upon the

statutes, and the statutes in this and every other respect in relation to wills must be strictly observed. A beneficiary should never act as a witness; the witnesses should be entirely disinterested persons. The witnesses should sign in the presence of the testator and of each other. The witnesses to a will should inscribe their addresses as well as their names.

Minors, if not too young, may act as witnesses. The witnesses should be personally acquainted with the testator, and be satisfied that he has sufficient mental capacity to make a will. It is not necessary that the witnesses know any of the contents. Their duty is merely to witness the signature of the testator and sign the attestation clause. The attestation clause should always follow the testator's signature and precede the signatures of the witnesses.

§ 310. **When effective.**—A will does not become effective until after the death of the testator. If the property devised should be conveyed before the will is in effect, then the will is inoperative in so far as that particular property is concerned.

The words most commonly used in a will to transfer the property of the testator are "give, devise, and bequeath." Devise is the technical word relating to transferring real property, and bequeath for personal property. A will must be executed in conformity to the laws of the state where the land is situated.

§ 311. **How revoked.**—A will may be changed, supplanted, or revoked at any time at the pleasure of the testator. It may be revoked by intentionally destroying it or by making a new will. If the will is destroyed it must be by the testator or someone acting for him and in his presence.

Contrasts.—A will differs from a contract, and consequently from a deed, in three points: (a) it is revocable, (b) it is voluntary—that is, without consideration, and (c) it requires no acceptance.

Distinguishing characteristics.—A will has four distinct characteristics:

First. A will is construed by the courts with less technical strictness than a deed, or other written instrument. The intention of the testator is the controlling feature and the technical meaning of words and phrases must yield to such interpretation.

Second. A will conveying real estate must be executed in accordance with the laws where the land is situated; a will of personal property in accordance with the law of the testator's domicile. Where a will is designed to affect land situated in different jurisdictions, it must be executed in conformity with the laws of each place.

Third. A will is ambulatory, that is, revocable, during the lifetime of the maker, and at his pleasure.

Fourth. There is no natural or common-law right to make a will. All authority by which wills are made is derived from some statute.

§ 311a. **Codicil.**—A codicil is a supplement or addition to a will, made by the testator, and is annexed to or to be taken as a part of the will by which the original dispositions contained in the will are expressly added to or altered. The word codicil literally means a "little will." A new will is usually intended and has the effect of revoking all previous wills, whereas a codicil acknowledges the existence of and leaves in full force the

Form of a Will.

I, Peter Sterling, of the city of Bellefonte, county of Center, and state of Pennsylvania, do make, publish, and declare this my last will and testament, that is to say:

(1) *I give and bequeath to Henry Sterling, of Boalsburg, county of Center, and state of Pennsylvania, the sum of two thousand (\$2,000.00) dollars.*

(2) *I give and devise to John Sterling, of the city of Bellefonte, county of Center, and state of Pennsylvania, all of lot numbered one (1) in block numbered two (2) in said city of Bellefonte.*

(3) *All the rest and residue of my property, real, personal, and mixed, of which I shall die seized or possessed, I give, devise, and bequeath to my wife, Mary Sterling.*

(4) *I hereby nominate and appoint the said Mary Sterling to be executrix of this will.*

(5) *I hereby revoke any and all former wills by me made.*

In testimony whereof I have hereunto set my hand and seal this tenth day of March, in the year nineteen hundred and twenty-one.

PETER STERLING.

Signed, sealed, published and declared by the above named Peter Sterling as and for his last will and testament, in the presence of us and each of us, who, in his presence, and at his request, and in the presence of each other, have hereunto subscribed our names as witnesses:

HENRY WISEMAN,
*of the county of Center,
and state of Pennsylvania.*

WILLIAM WILLIAMS,
*of the county of Center,
and state of Pennsylvania.*

previous will, of which it is a supplement, except so far as it undertakes to alter its terms.

A codicil must be executed with all the formalities of the will itself; it must be signed, sealed, and witnessed in like manner.

§ 312. **Title by descent.**—When an heir acquires the estate of his ancestor on the death of the latter, who dies intestate, the title is said to pass by descent.

Descent is the hereditary succession to real estate. When a man dies without making a will he is said to die *intestate*, and his real property under these circumstances goes to the persons whom the laws of the state where the land is situated designate as his heirs. Lands that descend thus are liable for the debts of the ancestor, but not until the personal estate is exhausted.

It is a general law that the real estate of a deceased person descends first to his children, subject to the right of dower or curtesy in a surviving wife or husband. If there have been any deceased children, the children of such deceased child, if any, take as a whole the share their parent would have taken had he or she lived. Should there be no surviving children or grandchildren the father is usually considered the next heir, next the mother, then the brothers and sisters. If there should be no relatives at all the property will revert to the state. It must be understood that the statutes ordinarily carry the rule far beyond what is here given.

Smith had three children, Bertha, Clara, and David. Bertha and Clara survived their father, but David died before his father, leaving two children, John and Mary. There are now two children and two grandchildren. Bertha and Clara will inherit one-third each of the estate, and John and Mary, the children of David, will take the share their father would have taken, each thus receiving one-sixth.

§ 313. **Joint estates.**—When land is owned by one person in his own right it is said to be held in severalty, but when vested in two or more persons it is a joint estate.

The two principal estates of this character are (1) joint tenancy, and (2) tenancy in common.

§ 314. (1) **Joint tenancy.**—When two or more persons by virtue of a purchase hold land jointly under one title they are said to be *joint tenants*. Each tenant has an equal share of the whole property. The distinguishing feature of this estate is the right of survivorship. When one tenant dies, the surviving tenant takes the other's share, free from any claim of the heirs of the deceased member even to the exclusion of the dower of the widow. Such estates have been either abolished or greatly modified by statutes in the different states.

§ 315. (2) **Tenancy in common.**—When two or more hold any part of or interest in a parcel of land in common with

others, they are said to be tenants in common. The property may be acquired by purchase or by inheritance and one of the tenants may hold a greater interest than the other or others. Each member has the right to sell his interest and the doctrine of survivorship does not apply. Upon the death of one of the owners his interest will pass to his heirs, subject to the right of dower or curtesy.

§ 316. (3) **An estate by entirety** is where land is conveyed jointly to husband and wife, and upon the death of one the other becomes entitled to the entire estate. During their life the husband has the possession and enjoyment of the whole estate.

§ 316a. **Title by adverse possession.**—A person may acquire title to land by what is known as adverse possession. This is possession of land for a length of time adversely to the title of another and will ultimately give the title to the possessor of the property without written evidence of such ownership. In order to acquire title by this means it is necessary that the possession be hostile to the true owner and under a claim of right; it must be actual; it must be open and notorious; it must be exclusive, and it must be continuous—usually not fewer than from seven to twenty years.

QUESTIONS

What is a will? Define (1) bequest; (2) devise; (3) legacy; (4) testator; (5) executor; (6) administrator; (7) intestate.

Who may make a will? What are the necessary formalities? When does it become effective? How may it be revoked? What are some of the distinguishing characteristics of a will? What is a codicil and its purpose?

What is the difference between joint tenancy and tenancy in common?

Give an illustration of title acquired by adverse possession? Against whom does such a title lie?

CASE PROBLEM

Case problem No. 178.—Doolittle, a widower, died intestate. He had three children, A., B. and F. Two of the children, A. and B., died before their father. A left one child, known as C., and B. left two children, designated D. and E. How should the estate be distributed according to the law in your state?

Case problem No. 179.—Adams conveyed certain land to B— and C— who were husband and wife. B—, the husband, afterwards died intestate, leaving C—, his wife, and two children surviving him. After B—'s death, to whom did the land belong? Why?

CHAPTER XLVII.

MORTGAGES OF REAL PROPERTY.

§ 317. **Definition.**—A mortgage is a conveyance of property upon a condition, as security for the payment of a debt or the discharge of some obligation. A mortgage is similar to a deed; and must be signed, sealed, acknowledged, delivered, and recorded. It conveys the land as fully and in the same way as if it were sold outright; but with a condition. This condition consists of a stipulation to the effect that if a certain sum of money is paid at a stated time then the title is to revert to the one giving the mortgage, or that the conveyance is to be void and of no effect.

The person who gives the mortgage—the debtor—is called the mortgagor, and the person to whom given—the creditor—is the mortgagee.

Notes.—In general any interest in land that may be sold, granted, or assigned, may be the subject of a mortgage. Land may be mortgaged separately from the improvements, or the improvements separately from the land. Leases, crops, dower of the widow or curtesy of the husband, are some of the various interests that may be mortgaged.

Any person competent to contract and who has an interest in the land at the time the security is given may make a mortgage.

The debt secured by a mortgage is usually in the form of a note or bond separate from the mortgage. The mortgage may also be made to secure the performance of some obligation other than debts.

A mortgage should be drawn and executed with all the formality required in a deed; it should likewise be recorded immediately. If not recorded it is void as against a subsequent purchaser or mortgagee, who had no knowledge of the mortgage.

The owner of land may sell his property and enter into an agreement that he may repurchase it for a certain price within a prescribed time.

When a mortgage is paid and satisfied it should be discharged of record. This may be done by a release deed, or by a notation on the margin of the record where it is recorded.

Plaintiff conveyed his farm worth \$15,000, by a deed, for a consideration of \$5,000. There was a separate written instrument granting the plaintiff the privilege of repurchasing the farm within four months from date upon the payment of \$5,000. The court held the transaction to be a mortgage and decreed that the grantor be allowed to redeem although more than the four months had elapsed. (12 Howard 129.)

Form of a Mortgage.

Know all men by these presents:

That Thomas Timmons, of Montgomery County, Ohio.

in consideration of One Thousand (1,000) Dollars

to him paid by Peter Sterling

the receipt whereof is hereby acknowledged, ~~does~~ hereby **Grant, Bargain, Sell and Convey** to the said Peter Sterling, his heirs, and assigns forever, Lot thirty-two (32) block six (6) in Oxford Park, an addition in Dayton, Ohio, as per recorded plat thereof.

and all the **Estate, Title and Interest** of the said **grantor** either in Law or Equity, of, in and to the said premises; **Together** with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof; **To have and to hold** the same to the only proper use of the said **grantee**

his heirs, ~~successors~~ and assigns forever.

And the said Thomas Timmons for himself and his heirs, executors and administrators, ~~successors~~ ⁽¹⁾ **does hereby Covenant** with the said Peter Sterling

his heirs, ~~successors~~ and assigns, that he is the true and lawful owner of the said premises, and has full power to convey the same; and that the title so conveyed is **Clear, Free and Unincumbered; And further, That he does Warrant and Will Defend** the same against all claim or claims, of all persons whomsoever; Provided, Nevertheless, That if the said Thomas Timmons shall well and truly pay or cause to be paid, his certain promissory note of even date herewith, for One Thousand (1,000.00) Dollars drawn to the order of Peter Sterling and payable in three years from date, with interest at six (6) per cent per annum then this mortgage shall be void.

In Witness Whereof, The said Thomas Timmons has hereunto set his hand this **twenty-second** day of August in the year of our Lord one thousand nine hundred and **fifteen.**

Signed and acknowledged in presence of—

A. M. Carter
Ed. Kuehnel

Thomas Timmons

§ 318. **Right of possession.**—The modern interpretation in relation to the possession of the mortgaged premises is that the mortgagor is the owner of the property and is therefore entitled to retain possession. This he may do until he fails to fulfill his agreement by defaulting in the payment of his debt and till he has been lawfully removed by foreclosure or other legal proceedings. A mortgage is now considered merely as a security for the debt and not as an absolute transfer of the title. So it has been held that the mortgagor may sell, lease, or otherwise dispose of the property, subject of course to the mortgage; and he is entitled to the rents and profits from the place and its crops.

§ 319. **Duties of both parties.**—It is the duty of the mortgagor to pay the interest upon the day when due, to pay the taxes and any other assessments against the property, and to keep the buildings insured. He must not impair or otherwise destroy the value of the security.

It is the duty of the mortgagee to give a written satisfaction upon the payment of the debt. This may be done by a quitclaim or release deed, or by an acknowledgment of satisfaction, release, or discharge drawn by the recorder of deeds on the margin of the record of the mortgage which must be signed by the mortgagee or by the lawful holder of the mortgage.

§ 320. **Equity of redemption.**—This is the right of the mortgagor to redeem his property and is largely regulated by statute laws of the various states. At one time it was the rule that if the debt was not paid on the day when due that the mortgagor had no further right in the property. This worked such a hardship and injustice that the courts allowed the mortgagor the privilege of redeeming the property at any time before it was foreclosed, but a foreclosure deprived him of his right. Now the statutes of some of the states permit the redemption of the property for a limited time even after it has been foreclosed, by paying the debt, interest and costs.

§ 321. **Foreclosure.**—The mortgagee has a right to foreclose upon the default of the mortgagor. This usually includes a sale of the mortgaged property under an order of court, and generally by an officer of the court. The method of these proceedings differs in the various states. If any surplus remains after the property is sold it must be paid to the mortgagor. But if there is a deficiency an action may be brought for the amount remaining due.

§ 322. **Deed of trust.**—Trust deeds are now used extensively in some states in place of ordinary mortgages, for securing the

payment of debts. In a trust deed the property is conveyed to a disinterested party called a trustee who holds the title for the benefit of the creditor. If the conditions of the trust are not complied with, the trustee sells the property and applies the proceeds to the payment of the debt secured. Such a deed is especially convenient when the debt secured is owned by several persons. The debt may be evidenced in the form of a number of notes or bonds with one deed of trust to secure them.

It is the trustee's duty to make the foreclosure when a default has been made in making payment. The proceedings are similar to the foreclosure of a mortgage.

QUESTIONS

Define mortgage. What may be the subject of a mortgage? In what respect does a mortgage differ (a) from a pledge? (b) from a deed? What are the rights and duties of (a) the mortgagor? (b) the mortgagee? Can the mortgagor place more than one mortgage on the same piece of property? If so, how can it be determined which mortgage has precedence over the other? Can a mortgage be sold? Can mortgaged property be sold? What title, if any, does the purchaser acquire?

Why is a note or bond given with a mortgage? How does a deed of trust differ from a mortgage and in what respect is it preferable?

CASE PROBLEMS

Case problem No. 180.—Allen being in urgent need of money borrowed the needed amount from Baker and gave as security a mortgage on a parcel of land Allen owned. The loan was not paid at its maturity and Baker brought an action in court to eject Allen claiming that Allen's failure to pay gave Baker legal title to the property secured by the mortgage. Is Baker's contention correct? (191 N. Y. 306.)

CHAPTER XLVIII.

LANDLORD AND TENANT.

§ 323. **Parties.**—The term, *landlord*, is applied to the owner or holder of lands, or houses which he leases to a tenant or tenants. He is also called the *lessor*. In every lease there must be a lessor able to grant the land and property capable of being granted. The one who holds the lands or tenements of or under another is called a *tenant* or *lessee*. The relation existing between the landlord and tenant is created by a contract express or implied. The possession of the property and the payment, or agreement to pay rent for its use, are the distinguishing characteristics that determine the relation of landlord and tenant.

To make a valid lease the landlord and tenant must be legally competent to contract. Leases made by a minor are not void, but may be avoided.

An ordinary agreement for board and lodging in a house by which the keeper retains the legal possession and care of the whole house does not create the relationship of landlord and tenant.

§ 324. **The Lease.**—The contract between the landlord and tenant for the possession of property rented for a specified time is termed a *lease*. A lease to one for the term of his or another's life is called a lease for life. If for a specified time, it is called a lease for years. One who holds the use and possession of the property, at the will of the lessor, and who may terminate it at his pleasure, is a tenant at will. A tenancy at will frequently arises when a tenant with the consent of the landlord holds over after the termination of a lease. In many jurisdictions, however, this constitutes a tenancy from year to year.

Davis gave to Roberts the following signed memorandum: "I, L. M. Roberts, have this day rented to S. Roberts the S. W. quarter of the S. W. quarter of Section 16, etc., for the term of ten years, for which he agrees to pay me an annual rent of \$50.00; and if he pays me the above named rent, I agree to make S. Roberts a good and sufficient warranty deed to said land." Roberts paid the rent during the specified term of years, and then demanded from Davis a deed. Davis refused to make a deed, contending that the memorandum was merely a lease, and there was no consideration for the promise to convey the property.

The court ruled in favor of Roberts. While the contract purported to be a lease, it was held to be a contract for the purchase of land on the installment plan. Parties may contract with reference to land, with the option of treating it as a sale or a lease.

§ 325. **Form.**—Leases may be either oral or written. If the time extends beyond a certain period, the lease must be in writing. This is provided for by the statutes of the different states.

In some states it need not be in writing if for less than three years, while in others if for one year.

Much of the law relating to landlord and tenant is based on the English law, and is favorable to the landlord. For this reason especially leases should be in writing, with the rights and duties of both parties fully stated, so that they may clearly know and understand what to do and what to expect.

No particular form of words is necessary to constitute a lease. Any words that will express the intentions of the parties will be sufficient, but it is important that the lease state in plain language all the conditions of the contract so that there may be no misunderstanding. The usual requisites of a formal written lease are:

(1) **The date.**—If there is no date the lease will be construed to take effect from delivery. The date fixes the time for the commencement of the tenancy, unless the lease itself fixes this time.

(2) **Names of the parties.**—The names of both parties to the lease should be given.

(3) **Consideration.**—An agreement to pay a certain sum, or any stipulated article, such as grain or ore, or the rendering of some service, will be a good consideration. Time of payment and the place where the rent is payable should be definitely stated in the lease. If no place is specified for the payment of the rent it is understood to be on the premises.

(4) **Property leased.**—There should be an adequate description of the property leased.

(5) **Covenants.**—Any special conditions or requirements should be stated clearly and explicitly. If the tenant is to pay the taxes, make repairs, or is to be prohibited from subletting, and the like, these conditions should be enumerated.

(6) **Duration.**—The time for which the premises are let should be definitely stated.

(7) **Signing.**—The written lease must be signed by both parties thereto, or by a duly authorized agent in the name of his principal. In some jurisdictions it must also be witnessed by one or more witnesses.

§ 325a. **Covenants in a lease.**—The covenants in a lease may be express or implied. Express covenants are those that appear in a lease, formulated in language. Implied covenants are those that are understood and are incident to and result from the relation of landlord and tenant.

The implied covenants on the part of the landlord are; (1) that he will put the lessee in possession of the premises; (2) that the lessor has a right to make the lease; and (3) that he will protect the tenant against any interference from anyone who claims to hold a better title than the lessor. This does not extend to trespass or other acts of strangers to the true title.

On the part of the lessee the covenants implied are; (1) that he will pay rent during his occupation—to pay a reasonable rent if the amount is not stipulated; (2) that he will use the premises and treat the property in a proper manner. He must use reasonable care to prevent damages and will be liable for waste committed on the premises; and (3) that he will surrender the property at the end of the term in practically the same condition in which it was received, subject to ordinary wear and depreciation.

A Lease.

The following is the form of an ordinary lease:

This Lease Witnesseth:

THAT Simon Smith, does
 HEREBY LEASE TO Adam Bede
 the premises situate in the City of Richmond in the County of
Henrico and State of Virginia described as follows:

The dwelling house, known as number 1802 East Broad Street,
 in the City of Richmond, State of Virginia.

with the appurtenances thereto, for the term of two years commencing
January 1 1915, at a rental of Fifty (50)
 dollars per month, payable monthly

SAID LESSEE AGREES to pay said rent, unless said premises shall be destroyed or rendered untenable by fire or other unavoidable accident; to not commit or suffer waste; to not use said premises for any unlawful purpose; to not assign this lease, or under-let said premises, or any part thereof, or permit the sale of his interest herein by legal process, without the written consent of said lessor; and at the expiration of this lease, to surrender said premises in as good condition as they now are, or may be put by said lessor, reasonable wear and unavoidable casualties, condemnation or appropriation excepted. Upon non-payment of any of said rent for ten days, after it shall become due, and without demand made therefore; or the breach of any of the other agreements herein contained, the lessor may terminate this lease and re-enter and re-possess said premises.

SAID LESSOR AGREES (said lessee having performed his obligations under this lease) that said lessee shall quietly hold and occupy said premises during said term without any hindrance or molestation by said lessor, his heir or any person lawfully claiming under them.

Signed this first day of January A. D. 1916

IN PRESENCE OF:

L. E. Edwards
E. R. Foster

Simon Smith

§ 326. **Landlord's rights.**—The landlord has the right to re-enter and take possession of the property if the tenant abandons it before the expiration of the lease. He may also do anything necessary to protect his property from loss or damage that does not interrupt or interfere with the tenant's right of possession. Otherwise he has no more right to enter the premises of his tenant than have strangers. The landlord is guilty of a trespass as a stranger would be under like circumstances where a lease has been given to a tenant and the landlord has not reserved to himself any privileges other than the payment of the rent. He has in effect conveyed the premises to the tenant for the time stated in the lease and the landlord has no more right to interfere with the tenant's peaceable possession than he would have to enter upon the premises of one to whom he had given a deed to property.

§ 327. **Landlord's duties.**—It is the landlord's duty to pay the taxes and other assessments on the leased property unless it is otherwise agreed in the lease. He is under no obligation to make repairs or to pay the tenant for any improvements made to or upon the property unless it is so provided in the lease. If the house is out of order, the tenant can not require the landlord to put it into good condition. If the leased buildings are destroyed through no fault of the lessor he is under no implied obligation to rebuild.

§ 328. **Tenant's rights.**—The tenant is entitled to the peaceful and undisturbed possession of the property. He has this right against the landlord as well as other persons. Unless the landlord consents to the abandonment, the tenant will be liable for any unpaid rent due under the lease.

The tenant has the right to make reasonable alterations needful for the particular use for which the premises have been leased where the purpose is known to the landlord, but if unknown the latter has a right to believe that they will be used for the purpose for which they are naturally fitted without alterations.

The tenant has no right to make alterations without the consent of the landlord for other uses, although they might be an improvement to the property. The tenant must be satisfied with the premises as they stand when leased and the landlord has a right to expect that they will remain so. This does not prevent the tenant from making temporary alterations which may be removed at the expiration of the term without injury to the property.

Everything that is appurtenant to leased land goes with it. By appurtenant is meant that which belongs to something else, but of less importance than that to which it appertains or belongs. A right of way is an appurtenance; trees are appurtenant to the soil. Therefore, the lessee who rents property has a right to everything appertaining to the soil, as houses, fences, trees, shrubbery, but not those things of a temporary character not belonging to the soil as implements, machinery or animals.

If a tenant rents a house he has a right to the lot, barn, trees, and the like. If the premises leased are part of a tenement house, he has a right to the use of the front door, the door bell, a place for drying clothes, and other customary conveniences

§ 329. **Tenant's duties.**—It is the first duty of the tenant to pay the rent. For nonpayment he is subject to eviction. Upon a failure to pay, the landlord must first make a demand for possession or serve a notice on the tenant to quit. If the demand is refused or the premises are not vacated, then a suit may be brought for the possession of the property.

A tenant will not be permitted to deny his landlord's title. The denial of the title of the one who put the tenant into possession is grounds for a forfeiture of the lease. If someone other than the landlord claims a title to the property and seeks to collect the rent from the tenant, it is the duty of the lessee to inform his lessor and call upon him to defend his title. If he fails to do so and the third party obtains a judgment, the tenant may then regard the latter as his landlord, and he will be protected in paying him his rent. The owner is not called upon to protect the tenant from the acts of trespassers or wrongdoers, unless it involves the title to the premises in a legal proceeding.

The tenant should see that his landlord has a title in the premises leased. If the title is defective the lessee can not acquire a better title than the landlord himself possesses. The lessor may have but a life interest in the property which will cause the lease to expire with the death of the landlord. The property may be encumbered with a mortgage liable to foreclosure at any moment, thus putting an end to the lease. Or the landlord may himself be merely a lessee with no rights to sublet.

It is the further duty of the tenant, unless otherwise stipulated, to keep the leased property in repair during his term, so that it shall return to the lessor in as good condition as when it was leased, ordinary wear and use excepted. Aside from an agreement to the contrary, he is merely required to take reasonable care of the premises. Hence, he would not be obliged to replace a window

broken by a stranger. If the property is destroyed by fire or otherwise without the fault of the tenant, the lease is ended and he is released from obligation to pay further rent.

If the tenant has agreed to keep the property in repair, he must make good all loss or damage. He must rebuild in case of a partial or total destruction of the premises, regardless of the cause, unless the damage is through the fault of the landlord. Leases ordinarily contain a clause stating that "ordinary wear and tear and damages by the elements excepted."

If the landlord is to keep the premises in a tenantable condition, it should be so stated in the lease, since verbal promises would not be binding. A written lease is presumed to contain all the agreements. A verbal promise to make repairs after the execution of the lease would be void unless there was a consideration for the promise. A promise to make repairs by the landlord, upon a threat of the tenant to move unless they were made, where the lease is unexpired, would not be binding, as the tenant is already under obligations to remain until the end of the term.

The tenant may sublet if his lease contains no provisions to the contrary. If there is a clause prohibiting the subletting of the premises and the tenant nevertheless sublets, he will be, as before, liable for the rent and also for any damages the landlord can show he has suffered by the violation of the lease.

§ 330. **Termination of lease.**—A lease for a fixed time expires with the arrival of that time. The lease may contain a stipulation that in case the tenant fails to pay his rent the landlord may declare the lease forfeited. If after a breach the landlord takes no steps to enforce his option, it will be deemed a waiver of the breach. If the landlord accepts from the tenant rent that accrued after the breach, this will also be considered a waiver. The landlord may accept the voluntary surrender by the tenant of his interest in the property before the expiration of the lease. A mere abandonment without the assent of the lessor is not a surrender, but a breach of contract on the part of the lessee.

Where there is a lease from year to year, the party seeking to terminate the agreement must notify the other party in writing of his intention to quit. This notice may be given by either party. The statutes provide the time and manner of giving such notice.

Notice of Tenant Terminating Tenancy.

Denver, Colo., October 1, 1921.

Mr. Abel Boone,-

I hereby give you notice that I will quit and deliver possession, November 1, 1921, of the premises No. 110 Champa Street, in the city of Denver, Colo., which I now hold as tenant under you.

John Doe.

When a tenant remains in possession of the property after his lease has expired with the consent or assent of the landlord, or if the landlord accepts the rent, it will be construed as a renewal of the lease upon the same terms and conditions.

When a lease is for a certain definite term, whether this be for a month, or for a year, at the expiration of this set time, the tenant may be evicted by the landlord as a trespasser, should he continue in possession of the property, but if the tenant offers to pay rent, and it is accepted, this will create a new lease by implication for another term of the same length.

At any time the tenant fails to pay rent the landlord may evict him. If the landlord accepts any part of the rent due, he cannot then evict, but must bring a suit to collect the remainder of the rent.

Landlord's Notice to Quit or Pay Rent.

To Benjamin B. Brown:

You are hereby notified that there is now due me the sum of seventy-five dollars, being rent for the premises situated in the City of Pittsburgh in the state of Pennsylvania, and known and described as follows:

No. 101 Broad Street.

And you are further notified that payment of said sum so due has been and is hereby demanded of you, and that unless payment thereof is made on or before the 15th day of April, 1921, your lease of said premises will be terminated.

Dated this tenth day of April, 1921.

SAMUEL SMITH [SEAL],
Landlord.

QUESTIONS

How is the relation of landlord and tenant created? What are the principal features which determine this relation?

What is a lease? When must it be in writing? What particular form of words is necessary? Why is it desirable to have a written lease? What are the usual requisites?

What is a lease for years? What is a tenant at will? How does a tenant at will arise? What is a tenant from year to year? What is the legal difference between a lease and a deed?

Define landlord. When may the landlord reenter and take possession of leased property? For what purpose may the landlord enter upon the leased premises? How do his rights compare with those of a stranger? What are the duties of a landlord? Whose duty is it to pay the taxes and special assessments against the property? Who is obliged to make ordinary repairs? Improvements?

Write a lease for the use of a house known as 121 Main Street, your city, for a term of years, from the 1st day of October, at a yearly rental of three hundred and sixty dollars, payable in equal monthly installments, payable on the first of each month, the landlord or his agent to have permission to enter the premises at any reasonable hour for the purpose of making needful repairs.

What are the tenant's rights? What is his first duty? What are his other duties? When, where, and to whom is the rent payable? May the tenant deny the landlords' title?

What is the obligation of the landlord to deliver the premises in any particular condition? If the tenant abandons the leased premises before the expiration of the lease, is he liable for the balance of the rent? To what use of the leased property is the tenant entitled?

What is an appurtenance? What are the tenant's rights in the use of the ordinary conveniences connected with a "flat?"

If the house is destroyed by fire without the fault of the tenant, what are his duties and obligations?

How is a tenancy terminated?

In what respects does the statute law of your state differ from the common law as to the relation of landlord and tenant and the formation and termination of a lease?

CASE PROBLEMS

Case problem No. 181.—July 1, Morrison leased a flat to Miller for one year at a monthly rental of \$40.00. During Miller's absence, the landlord entered the premises and put in a built-in-sideboard, a gas grate, and decorated the walls. These improvements admittedly made the premises worth \$60.00 a year more. Can Morrison hold Miller for five dollars a month additional rent?

In making the foregoing alterations, the landlord damaged Miller's furniture to the extent of one hundred dollars. Is the landlord liable to Miller for this or any other amount?

Suppose in the above case the improvements had been made by Miller upon his own responsibility. Can he collect the cost from the landlord? If it was proved that the alterations were necessary, could Miller then compel Morrison to pay for them?

Case problem No. 182.—Morse leased to Linn a house known as 411 Broadway, for one year at a yearly rental of three hundred dollars payable monthly. Linn continued in the house after the expiration of the term and Morse accepted the monthly payments. How can Morse recover back his leased property?

CHAPTER XLIX.

FIXTURES.

§ 331. **In general.**—The term fixtures is applied to articles of a personal nature which have been affixed to land. The word is sometimes used in a dual sense: first, it may be to denote things that can not legally be removed in case of sale by the owner who has affixed them; second, it may be to denote those personal chattels which have been annexed to land by a tenant and which may afterwards be severed and removed by the person who affixed them or by his agent, and against the will of the owner of the land.

The law of fixtures is, therefore, of importance in particularly determining the rights of a landlord and of a tenant in the removal of personal chattels by the tenant which he may have annexed to the land.

Whether a certain article shall be considered as realty or personality may depend upon one or more of these conditions:

- (1) The permanency of the annexation;
- (2) The purpose or use of the thing annexed;
- (3) The relation of the parties.

At common law everything that became affixed to the freehold became a part of it and belonged to the landlord. Later, exceptions were made in the case of trade fixtures for the purpose of encouraging trade and commerce; these exceptions were soon extended to include domestic and ornamental fixtures. In time the law in relation to fixtures has become filled with many intricacies and many contradictions, indeed so many that very few general rules are applicable. Each case must be largely determined upon its own circumstances and according to the decisions of the jurisdiction where it is to be adjusted.

§ 332. **Definition.**—A fixture is an article of a personal nature which has been so affixed or annexed to land that it may be regarded as realty. Fixtures placed upon a freehold may be removable under an agreement for their removal, or if they are affixed for trade or personal use. Difficulty frequently arises in determining whether the article affixed has become a part of the realty as a fixture and thus ceased to be regarded as personality.

If the article affixed to the land loses its identity or is irremovable on account of the damages that might be occasioned the real estate, then it becomes a fixture and is considered real property; as, brick in a wall, boards on a house, or shingles on a roof.

If the removal of the articles affixed does not materially injure the realty, as gas fixtures in a residence, counters and shelv-

ing in a store, or machinery in a factory, they will be considered as personalty and may be removed.

The article may even be physically affixed to the realty in some instances by the tenant and yet be considered as personalty. Thus, an engine bolted down in a building, but used as an accessory in conducting a trade or business would be removable.

Buildings placed upon the land with the consent of the owner, or if his consent is obtained after the building is erected, remain the personal property of the tenant. But if the building should be erected against the consent of the landlord or where his consent is never obtained, it becomes realty. To avoid disputes the parties should always stipulate in the contract what property, in the nature of a fixture, shall be considered real and personal property. They will in that event be bound by their contract.

In the absence of an agreement, removable fixtures must be removed during the time for which the premises are leased, or while the relation of landlord and tenant exists under the original lease.

If a chattel is attached to the land by the owner with a view of improving the property, it becomes a fixture and will pass with a sale of the property, unless it is expressly reserved by the terms of the contract of sale. This does not mean that he may not remove the fixture at will and do as he pleases with it at any time before he sells or makes a contract of sale of the land.

QUESTIONS

What is the general meaning of the term **fixtures**? What is the legal meaning? Under what conditions may fixtures be removed from the premises and who may remove them? In the absence of an agreement, when may they be removed? When does a fixture lose its character as personal property and become a part of the real property?

CASE PROBLEMS

Case problem No. 183.—The owner of a city lot, upon which is located a store building with shelving, gave a general warranty deed of the premises to a buyer. The owner described the property as real estate. After closing the deal, the seller claimed the shelving, but the buyer said the shelving, as well as the store building, was his. Which one is right, there being no agreement on the subject except the recital in the deed which merely described the city lot as real estate?

Case problem No. 184.—A tenant engaged in the mercantile business put up shelving in the ordinary way in the store. When his term expired, he attempted to remove the shelving. He had no agreement with his landlord as to the removal or nonremoval of the shelving. The tenant claimed it was personal property, and as such was subject to removal. Which one is right?



WILLIAM HOWARD TAFT,
CHIEF JUSTICE OF THE UNITED STATES.

[over]

WILLIAM HOWARD TAFT,

CHIEF JUSTICE OF THE UNITED STATES.

Born Sept. 15, 1857, at Cincinnati, Ohio. Educated in the public schools of Cincinnati, including Woodward High School, Yale University, and Cincinnati College of Law. Admitted to the bar of the Supreme Court of Ohio in 1880. Appointed assistant prosecuting attorney, Hamilton County, January, 1881, resigning in March, 1882, to become collector of internal revenue for the first district of Ohio. Resigned following year to enter practice of law, continuing until 1887, holding in meantime office of assistant county solicitor, from January, 1885. In March, 1887, appointed by Governor Foraker judge of the Superior Court of Cincinnati. Elected the next year for five-year term. Resigned 1890, to become Solicitor-General of the United States under President Harrison. In March, 1892, appointed judge of the United States Court for the sixth judicial circuit and ex-officio member of the circuit court of appeals. In 1896 became professor and dean of the law department of the University of Cincinnati, resigning both in 1900 to accept appointment from President McKinley as president of the U. S. Philippine Commission. Appointed first civil governor of the Philippine Islands on July 4, 1901. January, 1904, became Secretary of War in the cabinet of President Roosevelt. In 1906, visited Cuba in an endeavor to arrange peace, and acted for a time as provisional governor. Nominated for President of the United States in June, 1908, by the Republican National Convention at Chicago. Elected in November, receiving 321 electoral votes against 162 for William Jennings Bryan. Renominated in 1912; defeated in November of that year. Retiring to private life, became professor of law at Yale and lecturer and editorial writer. Appointed Chief Justice of the United States by President Harding June 30, 1921. Assumed duties on the bench October 3, 1921.

CHAPTER L.

BUSINESS CRIMINAL OFFENSE.

General Principles Applicable to Crimes.

§ 333. **Public wrongs.**—Every person is bound by certain obligations to his fellowman, not only as an individual, but as a member of the community, the state, or the government; and an omission of a duty commanded, or the commission of an act forbidden by a public law subjects the offender to what is termed a criminal prosecution. Criminal law is understood to be that portion of the law which has to do with crimes. A crime, according to Blackstone, is an act committed or omitted, in violation of a public law either forbidding or commanding it. A crime is a wrong done to the whole public, of such a character that the state will prosecute and punish the offender for committing the unlawful act.

Wrongful acts which affect the individual only are classified as private wrongs or torts; such as affect the public or society, as crimes or misdemeanors. The same act or wrong often constitutes a private injury as well as a public injury, causing the wrongdoer to be liable to the injured person under a civil action for damages or compensation, and to the community under a criminal proceeding by the state for the infliction of a penalty or punishment. The state is taken to be the person injured by the crime, as it represents the whole community.

§ 334. **Torts.**—A wrongful act or injury done to the person or property of another and for which a civil action will lie is termed a *tort*. It is distinct from a breach of a contract, such as the neglect or refusal to perform an agreement, although it may be closely connected, as where one person cheats another in a trade, or obtains credit by false representations. While a tort is distinct from a crime, the same act may be and often is both a tort and a crime. If a crime, it is of a nature in which the public punishment affords room for private compensation also.

Examples of a tort.—Roe in a fit of anger strikes Doe. Roe has committed a tort called an assault and battery for which he may be punished criminally by a fine and imprisonment and the party beaten may recover damages in a civil suit.

If one enters upon the land of another without permission he has committed a tort, called a trespass to property.

Attacks upon one's reputation by writing or speaking malicious words derogatory to his character amounting to libel or slander is a tort.

Infringements of patents, copyrights, trademarks; selling tainted meats or unwholesome provisions for human consumption; maintaining a nuisance, such

as a foul or imperfectly constructed sewer or gas main; injuries caused by defective sidewalks, highways, bridges; the careless use of firearms, teams, automobiles, locomotives, and the like, are further examples of wrongs constituting a tort.

If a coachman is driving his master's carriage in the ordinary course of his duty, and by his negligence he runs over a person and injures him, this is a tort for which the master may be liable in a civil action. With regard to the coachman he may not only be guilty of a tort, but of a criminal offense as well.

§ 335. **Classification of crimes.**—Crimes are divided into (a) felonies, and (b) misdemeanors.

§ 336. (1) **Felony.**—A felony under the statutes of most jurisdictions is an offense of which the victim on conviction shall be liable by law to be punished with death or imprisonment in the penitentiary. Generally speaking, felonies are the more serious crimes. To be guilty of a felony the person need not be actually put to death or go to prison, but be liable to do so for the offense committed. A jail sentence for an offense subject to punishment as a felony is nevertheless a felony.

§ 337. (2) **Misdemeanors.**—The term misdemeanor is applied to offenses of a trivial character punishable by a fine only, or by imprisonment in the county jail, or both.

§ 338. **Principals and accessories.**—When several persons participate in the commission of a crime all are criminally liable, although some may have only aided by advice or been present and coached. Hence, it is not necessary that one actually commit the criminal act to be guilty thereof as the actor. One who advises or procures another to commit a crime and who does commit it is the principal whether present or absent when the crime is committed, and is responsible for the act. An accessory is one who has connection with the crime by reason of preparation, procurement, advice or encouragement so as to be criminally liable, but who does not participate in the final commission of the act. He is not the chief actor, nor present at its performance, but is in some way concerned therein, either before or after.

§ 339. **Capacity of parties.**—No one can be held responsible for a crime unless he has sufficient capacity, mental or otherwise to commit it. The test of responsibility is the ability of the offender to distinguish between what is right and what is wrong. An infant under the age of seven is presumed to be incapable of having a criminal intent and is therefore not punishable criminally. Between the ages of seven and fourteen the presumption is in favor of his incapacity, but this presumption may be removed by evidence to the contrary. After the age of fourteen he is considered in law the same as an adult so far as criminal intent is concerned.

Insanity is a disease of the brain and prevents one from having a criminal intent. And although this incapacity did not exist at the time the act was committed yet if it occurs afterwards it will be sufficient to prevent the infliction of punishment.

Voluntary drunkenness is no excuse for committing a crime and affords no defense, but is held in law rather an aggravation than a justification of criminal misbehavior.

§ 340. **Punishment.**—A civil action is for the purpose of obtaining redress for a private injury. A criminal prosecution is to punish the accused in order that he may be an example to deter others who may be tempted from offending in a like manner, or to protect the public by depriving the wrongdoer of the power to do future mischief and also if possible to reform the offender. As soon as a crime is committed an injury has been done the state, and it is the state's right and duty to prosecute the guilty offender and punish him for his act. The person particularly injured has no control over the criminal proceedings and no settlement between him and the wrongdoer can take away the state's right to punish the offense. In fact, if a person attempts to settle for a consideration with one who has committed a felony he is himself guilty of a crime termed *compounding a felony*. And if one attempts to extort money or property from another by means of intimidation as a reward for refraining from prosecution for a felony or public accusation, he is guilty of *blackmail*. Those particular classes of crimes which distinctly affect man in his business dealings with others will be considered in the succeeding sections.

§ 341. **Cheats and frauds.**—Every person who knowingly and designedly obtains from any person or persons, money, goods, wares, merchandise, or valuable thing or effect, with the intent to cheat or defraud another, and who shall in pursuance of such intent to cheat and defraud, after obtaining possession of any such property, sell, transfer, secrete, or dispose of the same before paying or satisfying the owner, shall be punished in the same manner and to the same extent as for the feloniously stealing of money, property, or thing so obtained.

The pretense may be either written or spoken, and must be made with the intent to defraud. It must be believed by the party to whom made and be acted upon so as to cause injury. If the statement made to secure the property through fraud and deceit turns out to be true, it is no crime, although it was made fraudulently and accomplished the desired purpose. Likewise, if a statement is false it is no crime if the pretense did not deceive nor was the means of procuring the property. The statement must be false and fraudulent and made with an intent to

deceive and must actually deceive by having a direct bearing on the obtaining of the property. The fact that one said he had traveled extensively and was once rich, though false and made with the intent to deceive, would be too remote to have any influence in obtaining credit.

To be a criminal false pretense it must be based on a matter of fact of some past event or some event having a present existence and not merely a promise as to something to take place in the future. A mere representation of opinion is not a false representation. If one borrows money and promises to pay it at a certain time he is not liable to conviction for a crime, although he may not have intended to pay when he borrowed it. One who obtains a loan of money on a lot which he said was "nicely located" and was well worth a certain sum would not be guilty of obtaining money under false pretenses. Its value would be a matter of opinion, and "nicely located" might mean one thing to one person and something else to another.

The securing of property by false pretenses has two criminal intents, as in larceny. (See § 346.) (1) It is the acquiring of the property, and (2) depriving the owner of it permanently that constitutes the offense. If the intent is not to acquire the property or not for the purpose of defrauding the owner then the law is not violated.

§ 342. **Criminal conspiracy.**—An agreement between two or more persons to commit a crime is a conspiracy. It has been said that a conspiracy is an agreement to do an unlawful act by lawful means or a lawful act by unlawful means. Under certain conditions an agreement may be a conspiracy, even though the act agreed to be done is not a crime at all or an act publicly injurious, but merely a civil wrong, as for instance, to manufacture a spurious article to sell as a genuine; to obtain a monopoly to raise the price of a commodity so as to compel the consumer to purchase it at an exorbitant price.

Any joint effort to purchase goods upon the impression of solvency with no expectation of paying for them; or any understanding by two or more persons to dispose of goods in contemplation of bankruptcy is punishable as conspiracy. It is a conspiracy to injure a man, or his trade, or his profession. The act of each conspirator is the act of the other if done in the prospect of a common design.

Men may lawfully combine for the purpose of dictating their own wages, choosing their own employers, and to serve man and mammon according to the dictates of their own conscience. To this end there is nothing unlawful in a strike to compel employers to comply with their demands and desires. And when on a strike it is lawful for them to try to induce other workmen

to join with them. But they must abstain from actual violence.

On the other hand it is unlawful for employers to coerce or intimidate wrongfully their workmen in the disposal of their talents. Every man has the right to employ his talents, industry, and capital as he pleases, free from the dictation of others, and if several combine to coerce his choice, it is a criminal conspiracy, whether the means employed are actual violence or a species of intimidation.

§ 343. **Libel.**—A libel is a malicious defamation of any person made public by printing, writing, signs, or pictures tending to blacken and vilify the memory of the dead and with intent to provoke and scandalize his surviving friends and relatives, or to injure the reputation of one who is alive by exposing him to public hatred, contempt, or ridicule, or to deprive him of public confidence. Written language is libelous which denies to a man the possession of such worthy qualities as every person is presumed to possess, or which tends to bring him into public disgrace or to degrade him in society.

False and defamatory words, if written and published, constitute libel; if spoken, a slander. Libel is the greater offense as it implies more deliberation in the intention of injuring another, and is calculated to circulate more extensively. Oral words are frequently soon forgotten or are more likely to be misunderstood.

Words are libelous which impute that the party to whom they refer has been accused of a crime, fraud, dishonesty, immorality, vice, or dishonorable conduct, or has been accused or suspected of such conduct. It has been held that to write of a person that he is a "swindler" or of another that he was black-balled on an application for membership in a club was libelous. And one may be guilty of libel or of slander without being the author of the defamatory words; it is sufficient if he repeats what is said by others; he may be liable for having assisted in the circulation of the story without having expressed an opinion that it is true.

Publication is made when the matter is exhibited to anyone. To dictate a libelous letter to a stenographer subjects the party doing so to an action for damages, whether such a letter was sent through the mail or was otherwise delivered or published. A communication regarding the character of an employee made to the employer, or one about to employ such a person is regarded in law as a privileged communication, when made in good faith, and is not ground for prosecution for a libel. Under similar circumstances if a banker reports a firm according to the best of his knowledge and information—the communication being

made from a proper motive without malice or heedlessly—there will be no liability even though the report may be incorrect.

§ 344. **Trespass.**—In its widest sense, a trespass signifies any transgression or offense against the law of society, or of the country in which we live, whether relating to a man's person or property. Hence, any interference, however slight, which unlawfully disturbs a party in the enjoyment of his property is a trespass, as placing rubbish on a neighbor's land, breaking a blade of grass, or flying a kite over another's land. If a person commits a trespass against the person or property of another under a mistake, honestly made, he is nevertheless guilty of a trespass and is liable to the injured party for damages.

A man's house can not be entered forcibly for the execution of a civil process, but it may be so entered for the purpose of executing a criminal process. A trespass may be committed by one who enters upon the land or premises of another lawfully, but while on another's property does some unlawful act. When a highway is blocked by reason of some sudden or unexpected obstruction the public have the right to pass over the adjoining property to get around the obstruction—without being guilty of trespass.

Everything which the law recognizes as property may be made the subject of a trespass. It is not necessary for the owner to show special damages in order to maintain an action of trespass. Ordinarily the measure of damages is the actual value of the property destroyed. Damages are awarded as compensation to the injured person for the damages done. The spirit which actuates the party in committing the trespass enters into the question as to the amount of damages. If no perceptible injury has been done as the result of the trespass the mere fact of the trespass entitles him at any rate to a verdict for nominal damages. A person trespassing after notice or a warning not to do so aggravates the offense and justifies damages as a penalty.

§ 345. **Arson.**—At common law, arson consisted in the wilful malicious burning of the house of another by day or by night. Anciently it was regarded as a heinous felony and punished with death. Statutes have extended the offense to various other burnings than those originally included, so that any permanent place of residence is a house within the meaning of the law and it is therefore arson to set fire to a jail, asylum, or other edifice occupied by persons lodging therein. Likewise one may be guilty of the crime of arson if he burns any shop, office, store, depot, boat, etc., regardless of whether the same is occupied or not, or any goods or chattel which are insured regardless of the owner of them. It is arson to burn one's own house, or thereby

set fire to the house of a neighbor. The crime is complete as soon as any part of the structure, however trivial, be burnt; if a shingle is consumed, or charred, though the fire afterwards be extinguished it is sufficient. If the building is merely filled with smoke and the wall blackened, arson has not been committed.

§ 346. **Larceny defined.**—Larceny at common law is the wrongful or fraudulent taking and carrying away of the personal property of another with the intent to convert it to the taker's own use, and to make it his property without the consent of the owner. The thing stolen must be of some value for the act of stealing to be larceny. Abandoned property can not be stolen because there is no owner. Formerly deeds, bonds, mortgages, notes, and the like were not held to be property but evidence of title or indebtedness.

The distinction between larceny and robbery is that the former is done without violence or circumstances of terror resorted to for the purpose of inducing the owner to part with his property, while the latter is the taking of money or goods of any value from another against his will by violence or putting him in fear.

The taking need not necessarily be done with a felonious intent if there is a subsequent misappropriation. If a person drives away a sheep belonging to another, through an innocent mistake, and if after the mistake is discovered the one who inadvertently drove it away sells it for his own use, and denies knowledge of the occurrence, he will be held to have committed larceny. Taking of lost property with the intent to keep it makes the defendant guilty of larceny.

Ordinarily, to constitute the crime of larceny, the possession of another's property must be obtained unlawfully, that is, against the will or consent of another. Therefore, it is larceny for one to insert a metal disc in an automatic vending machine for the purpose of obtaining something of value which the owner intended to part with only to the one who placed a coin in the machine.

If one enters a store for the apparent purpose of buying goods and they are delivered to him to examine and he carries them away without paying for them, the taking is larceny. If goods are ordered and delivered the buyer agreeing to pay cash when the goods are received pays for them with a check which is subsequently returned indorsed "insufficient funds," the buyer is guilty of larceny if he refuses to pay for the goods and retains possession of them. Likewise, if upon a purchase of goods the buyer pays for them by giving the vendor a bill for change and the seller refuses either to return the bill or the change, then the latter is guilty of larceny, for the bill was delivered upon the condition that it would be changed or returned.

If the owner of property places the same in the possession of another, as a tailor or blacksmith, who thus acquires an interest in the goods for the service done, or if he deposits his watch as security for a board bill, the owner will be guilty of larceny if he fraudulently takes his own property from such a bailee without the latter's consent and without paying for the services.

Again, if one agrees to purchase gas from a gas company at so much per thousand feet and the company installs a meter to measure the gas used and the defendant makes a secret connection between his pipe and that of the company's main, such conversion of gas will be larceny.

§ 347. **Carrying away.**—To be guilty of the crime of larceny the thief must take and carry the goods away. But he need not go any great distance. Any moving of the parcel is sufficient to constitute carrying away. But there must be control over the thing attempted to be taken away. A thief was held guilty of larceny who grasped the bills in a till and dropped them to the floor in a crumpled condition upon being discovered, while another thief who knocked the money out of the hands of a bystander to steal it was not guilty of larceny because he could not find the money on the ground where it fell and he never had complete control over it. Merely to remove the goods from their usual place with the intention of carrying them away is larceny.

§ 348. **What goods are another's?**—If a man steal his own property with the intention of charging another with its value or theft of the property, the owner is guilty of larceny. As for instance, if one lends another his umbrella and later retakes it secretly with a view of holding the bailee liable for its value. Even a thief has a sufficient property interest in the goods stolen to make it larceny for anyone else to take the same goods from him. But a wife can not commit larceny or steal her husband's goods, neither can she embezzle them.

§ 349. **Embezzlement.**—Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted, or in whose hands it has lawfully come, as of an employer's money by his clerk or of public funds by an officer having them in charge.

Embezzlement differs from larceny in that the original taking of the property was lawful or with the consent of the owner, whereas in larceny the thief obtains the goods by stealth, or without holding a position of trust. In embezzlement the wrongdoer fraudulently converts the property of another which he has obtained by virtue of some fiduciary relation to his own use. There must be a relation of confidence and trust, and the appropriation must be with a fraudulent intent.

If a clerk or servant or agent has the possession of the goods

or money which he wrongfully converts to his own use, the offense is embezzlement. But if he puts the money in the safe and afterwards takes it, he is guilty of larceny, for the money is then in the possession of the master. The distinction is between custody and possession. A servant who receives goods or money from his master for a specific purpose has the custody of them while the possession is in the master.

Where money has been paid or property delivered through mistake and has been misappropriated or converted by the person receiving it, the latter is not guilty of embezzlement, as where a person drawing his deposit from a bank is paid, by mistake, more than is due him. This will not prevent a civil action for the amount overpaid.

§ 350. **Forgery.**—The false and fraudulent making, marking or altering of an instrument which would if genuine apparently impose a legal liability on another or change his legal liability is termed forgery. The making or alteration of any material part is sufficient to constitute such a crime. It is a forgery to write a promissory note above the signature of another upon a blank piece of paper without authority from the latter; or to make, alter, or erase figures so as to change the amount of a note or the date of its payment. It is forgery for a bookkeeper to enter one sum when directed by his employer to enter another amount, and the false entry is made with intent to defraud.

To be forgery the instrument must purport to be what it is not; to be the writing of one man when it is the writing of another. One signing an assumed or fictitious name is not guilty of a forgery if there is no attempt to commit a wrong on a third person. If the purpose is to acquire goods or money and avoid discovery of his identity, then he is guilty of a forgery.

It is no defense where one fraudulently signs his name to an instrument belonging to another that he happens to have the same name. If one claims authority to sign the name of another, and so signs the other's name by himself as agent he is not guilty of forgery, but of making a false statement of fact. If he does not have the pretended authority, it is merely a lie in writing which is no worse than a lie spoken.

An alteration is false when made by any person having no lawful right to do so, and it is fraudulent when made with intent that the false instrument shall be used or received as valid. The instrument must bear a resemblance to the one for which it is put forth, but it need not be perfect or complete; it is sufficient if it is calculated to impose on mankind in general, though a person skilled in that kind of writing would detect its fallacy and not be deceived thereby. The essence of a forgery is the intent to defraud. A mere imitation of another's writing, the assuming of a name, or the alteration of a written instrument, where no person can be injured does not come within the definition of forgery.

The crime of forgery is completed by the making or altering of the instrument with intent to defraud, although no one may be in fact defrauded. *Uttering* is a separate and distinct crime from that of the actual forgery, and consists in the attempt to pass the forged instrument, or by word or by action declaring it to be good.

QUESTIONS

What is a crime? Name several crimes. What is a tort and how does it differ from a crime? Name several torts. Give an illustration of (a) an act which is a tort, and not a crime; (b) an act which is a crime, and not a tort; and (c) an act which is both a tort and a crime. Who is considered the injured party in (a) a crime; (b) in a tort?

What is the usual test for determining whether a committed crime is (a) a felony; (b) a misdemeanor? Illustrate the difference between a **principal** and an **accessory**.

What persons are considered incapable of committing a crime? How does this rule compare with that of capacity to make a contract?

What is the purpose of (a) a civil action, (b) a criminal prosecution? What is cheating? In what must the pretense consist?

Define larceny. What is the distinction between larceny and robbery? To be guilty of larceny what must the offender do? Give several illustrations of larceny? Can a wife commit larceny against her husband? Why?

What is criminal conspiracy? For what particular purposes may men lawfully combine?

What is libel? In what respect does it differ from slander? Which is the greater offense and why? What are libelous words? If one merely repeats what someone else has said, is the former person guilty of libel or slander? When is one exempt from liability?

What is a trespass? Give several illustrations. What may be made the subject of a trespass? On what theory are damages awarded for a trespass?

What is arson? When is the crime completed? Is it arson to burn one's own building?

What is embezzlement? How does it differ from larceny? What is forgery? When is the crime completed? If one signs a fictitious name to an instrument, is it forgery? When is an alteration of a written document forgery? Give an illustration.

CASE PROBLEMS

Case problem No. 185.—A salesman for a wholesale grocery house took an order from a merchant for 500 sacks of sugar. At the time of giving the order the merchant submitted a financial statement showing that he had resources of \$12,000.00 and liabilities less than \$500.00. Relying upon the strength of this statement the house shipped the sugar, but afterward learned that the statement was false and that the merchant was absolutely insolvent at the time the order was given. Is the merchant criminally liable? What rights has the wholesale dealer with regard to the sugar?

Case problem No. 186.—Blank stored a bicycle in the Acme warehouse and paid the required charges. One afternoon Blank secretly entered the warehouse and removed his bicycle, intending to hold the warehouse liable for its loss. Can Blank be criminally prosecuted for taking his own bicycle?

Case problem No. 187.—Defendant spoke to A attacking A's character and using slanderous words. The words were spoken in a public place, but not in the hearing of any person other than A. Would defendant be held liable?

Case problem No. 188.—Roe owed Doe a sum of money. Roe entered the latter's place of business for the purpose of tendering the amount due. Was this a trespass?

Case problem No. 189.—Kane was cutting down trees on his own land. One of the trees, contrary to Kane's intention, fell upon the adjoining land of Blank. Was this a trespass to Blank's land?

Case problem No. 190.—On a calm morning a farmer lighted a fire in his inclosed field, but the wind presently changed and a whirlwind, carrying the fire beyond his control, destroyed his neighbor's property. Can the neighbor recover damages?

CHAPTER LI. THE HISTORY OF A LAWSUIT.

The Beginning.

§ 351. **The case of Brown vs. Foster.**—It appears that there was an agreement between the plaintiff and the defendant that the former was to make and deliver to the latter upon a certain day a suit of clothes, which, according to the terms of the contract, was to be made to the satisfaction of the defendant. The clothes were made and delivered upon the day specified, but were not to the satisfaction of the defendant, who declined to accept them and promptly returned them to the plaintiff. Thereupon the plaintiff, believing he had a just cause of action, employed the services of a lawyer to bring a suit to secure compensation for valuable service and for materials furnished the defendant, who, as the plaintiff believed, unreasonably refused, through caprice, to accept and pay for the articles manufactured.

§ 352. **The purpose of law.**—The purpose of law is the interpretation and assertion of the rights of persons and property. The rights and obligations of a civilized people are decided by institutions known as courts. Whenever a legal right is invaded, the injured person may appeal to the courts for a remedy. This privilege is accorded to every citizen. Hence, the plaintiff in the foregoing statement sought the aid and advice of a lawyer for the purpose of adjusting his grievance, and in due time a suit was commenced for the alleged breach of contract.

§ 353. **An action or suit.**—When a person seeks the relief afforded by a court, the machinery of the law is set in motion by bringing an action or suit. An action is defined as the legal proceeding by which one demands or enforces one's rights in a court of justice. A civil suit is the prosecution of a demand by a person, either natural or artificial (as a corporation), against another, to enforce a right, to prevent a wrong, or to recover a claim, while a criminal action is a prosecution by the state against the one who has committed a public offense known as a crime. A remedy in a civil suit is the means by which the person instigating the suit secures the enforcement of his right, for it is a well known maxim of law that there can be no wrong without a legal remedy.

§ 354. **Parties to an action.**—In a civil action there must be at least two parties. In this respect an action at law is similar to a contract. Each of these parties may consist of one or more persons. The one who institutes the action is known as the plaintiff, the one against whom it is brought is the defendant. In a criminal prosecution the state is the plaintiff; the one accused of the crime is the defendant. The one who brings an action in a civil suit must be competent to contract. An incompetent person, as a minor, is permitted to bring a suit in the name of someone appointed for that purpose who is known as a guardian. Again, a person can not be both a defendant and a plaintiff in the same action.

§ 355. **Jurisdiction.**—Courts vary in power and authority, from those of justices of the peace, having jurisdiction in the most petty and trivial cases, to the Supreme Court of the United States, the most powerful tribunal in the land. The term jurisdiction means the lawful right or power of a court to hear and determine causes. This jurisdiction is defined by law. Over matters outside of its jurisdiction a court has no control, and any acts in reference to such matters would be void. Jurisdiction is either original or appellate. Original jurisdiction is the authority to hear the case in the first instance; while appellate jurisdiction is the right to review and correct the actions of an inferior court. To some courts are intrusted controversies concerning crimes, while another court may be devoted entirely to the administration of the estates of deceased persons; to others is assigned litigation involving property within a given territory. It is, therefore, highly essential in bringing a suit that it be brought in a court having the proper jurisdiction. The lawyer for the plaintiff, believing his client has a just cause of action, next must determine what court has proper jurisdiction.

§ 356. **The summons.**—The technical beginning of an action is a summons. This is a formal notice to the defendant to appear before the court and defend the action. The defendant is bound by what a court does, in a case to which he is a party, only in the event that he has been notified of the proceedings. The summons must contain the names of the parties to the suit, the nature of the cause, and the amount sued for, if a money demand is involved. In some jurisdictions it is issued by the judge or clerk of the court, while in other jurisdictions it may be issued by the attorney for the plaintiff. It must be served by the proper official, upon the defendant personally and in such a manner as to let the person served know what it is.

§ 357. **Pleadings.**—After an action has been commenced by the service of a summons, the case is brought before the court

by a series of pleadings. Pleadings consist of the formal statements of the parties, made in writing before the trial, by which they apprise the court and each other of the respective versions of the matter in controversy upon which they rely.

The defendant has a right to know for what he is being brought into court; hence the plaintiff must state the facts on which he seeks the aid of the court against the defendant. This statement of the plaintiff's cause of action is called a *petition* in some jurisdictions, while in others it is termed a *complaint*. Ordinarily this document is served with the summons, but it may be served later.

The plaintiff also has a right to know on what facts the defendant defends; therefore, the defendant must make a statement in which he sets forth his side of the case in a plea called an *answer*. The plaintiff may then need to make a further statement, which is called the *reply*. The case is now in court.

QUESTIONS

What is the purpose of law? What is an action? What is a civil suit? How is an action, or a suit, instituted? How many parties are there to an action? and how are they designated? Compare the parties to a suit with those competent to make a contract.

What is a remedy in a civil suit?

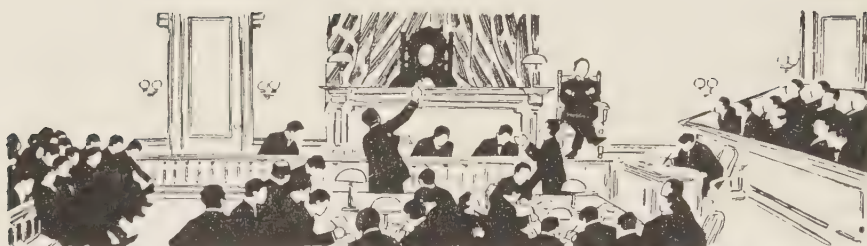
What is meant by the jurisdiction of a court? What is the difference between (a) appellate jurisdiction, and (b) original jurisdiction?

What is a summons and its purpose? What must it contain and who issues it?

What are pleadings, and their object? In what respect does a petition differ from a complaint? Why is it necessary to inform the defendant of the matters with which he is to be charged?

CHAPTER LII.

COURTS.



§ 358. **Courts.**—Courts are established to compel men to perform their obligations. The word court is from the Latin *cohors*, an inclosure. The idea of place, from which the term is derived, is reminiscent of the time when justice sat in the open courtyard. This derivation has given prominence to the definition of a court as “A place where justice is judicially administered.” A court is more than a place; it is also a tribunal established for the decision of controversies affecting legal rights and for the prevention, redress, or punishment of legal wrongs; it consists of one or more judges, together with such other officers, clerks, sheriffs, jurors, and the like, as may be necessary for the transaction of its business according to law.

§ 359. **Officers, their duties.**—It is the duty of the judge to preside over and direct all the proceedings of the court and to decide all questions of law arising in the course of such proceedings.

It is the duty of the clerk to make and keep true and complete records of the proceedings of the court, administer oaths, tax costs, receive money, and perform much of the ordinary routine business.

The office of sheriff is of great antiquity. His duties in this country are to open and close court, enforce order therein, manage the county jail, have charge of juries, and serve writs, warrants, and other mandatory orders. A sheriff is a ministerial, not a judicial officer.

§ 360. **Courts of record.**—Courts are classified as courts of record and those not of record. A court of record is one whose acts, proceedings, and decrees are enrolled and received in other courts as conclusive evidence of the facts therein contained. Its

authority is of such a character that the truth of such facts is not to be questioned. The keeping of a record of the proceedings of the court does not necessarily make it a court of record, as courts not of record keep minutes of their proceedings. Most of the judicial courts of the United States are courts of record. The constitution provides that "full faith and credit shall be given in each state . . . to the judicial proceedings of every other state." These records are also received, through international courtesy, as evidence in the courts of other countries, and their proceedings are likewise received here.

§ 361. **Federal courts.**—The courts in this country are divisible into two groups: (1) federal courts, and (2) state courts. The federal courts are instituted by the Constitution and acts of Congress, and they administer justice in the name and under the authority of the United States. Their jurisdiction is limited, but not inferior, and is defined by the authority creating them.

§ 362. **The Supreme Court.**—The Federal Constitution provides that the "judicial power of the United States shall be vested in one Supreme Court and such inferior courts as Congress shall from time to time ordain and establish." The Supreme Court is, therefore, the most responsible body in the land. The decisions of this court are the final decisions of the government. The sessions are held in Washington and the only questions decided are those of law. These decisions being the last word, they absolutely determine the law—and must be obeyed. The authority vested in this body makes it one of the most responsible departments of our government.

The court consists of nine judges, called justices of the Supreme Court; the whole body is called the Supreme Bench; the presiding judge is called the Chief Justice of the United States.

§ 363. **State courts.**—Each state has its supreme or appellate court as well as its inferior tribunals. Whether a case is to be tried in a United States court or in a state court will depend upon the kind of a case it is and not upon where the difficulty arose. A case can be tried in a United States court only if it comes under some of the provisions giving that court jurisdiction.

Courts may also be divided into common law courts, equity courts, probate or surrogate courts, and other courts of a minor character established for special purposes. It will thus be readily seen that each state has made sufficient provision for satisfying whatever litigious propensities any of its citizens may care to exercise.

Common law courts may be either original or appellate, with authority to try civil or criminal cases. Courts of equity have

jurisdiction where there is no adequate remedy at law. Testimony in such courts is chiefly in the form of written documents instead of oral evidence, and the judge decides the facts as well as the law. Probate courts have jurisdiction over the estates of deceased persons with authority to appoint guardians and to hold inquisitions of lunacy. They are sometimes called orphans' courts. Except when otherwise provided, a justice of the peace has but limited jurisdiction over petty criminal offenses and civil suits for trifling sums. Originally justices of the peace were county gentlemen of high standing in their counties. Their chief duty was the conservation of the peace; they presided and decided without the aid of a jury.

QUESTIONS

What is a court? Its purpose? What is a kangaroo court? Consult a dictionary as to the origin of the word. The courts of this country are divided into what two general classes? Enumerate the various federal courts and give, in a general way, their jurisdiction. What are the several state courts of your state and also their jurisdiction in regard to the cases over which they have authority?

What is a supreme court?

How many judges are there of the United States Supreme Court? How are they selected and how long do they hold office. What recent changes have occurred in this court?

What are the ordinary officers of a court, and their duties?

CHAPTER LIII.

THE TRIAL.

§ 364. **In court.**—At a time appointed, after the pleadings are served, the parties appear before the court with their attorneys and witnesses and the case comes to trial. Causes involving questions of fact are usually tried before a jury; equity cases are tried before a judge without a jury; criminal cases are tried before a jury if the accused demands a jury trial. Therefore, in a case requiring a jury the next step is the impaneling of the jury.

§ 365. **The jury.**—The jury is selected from the inhabitants of the county; their qualifications are fixed by the statutes. A certain number are summoned to attend court and from the number summoned twelve disinterested men are selected to try the case. In a justice of the peace court a case may be tried with six jurymen.

When a jury is seated in order for the commencement of a trial, it is said to be impaneled, and is sometimes called "the panel."

In the beginning of "trial by jury" the jury consisted of men chosen from the vicinity of the controversy who were acquainted with the parties and facts involved and used their own knowledge as well as the testimony of witnesses in deciding the dispute. Gradually the method of selecting and the character of the jury has changed until the country is scoured to find men who are ignorant of the case in which they are to sit. They are now merely triers of the fact which they gather exclusively from the evidence produced in court.

§ 366. **Opening statement.**—The trial is opened to the jury by reading the pleadings and making the opening statements. These statements are merely a brief presentment of the facts which the parties expect to prove, so that the judge and the jury may have some conception of what the case is about and that the evidence will be more intelligible to them as the witnesses are examined. These statements are made by the counsel for the respective parties. Evidence bearing on the case is then heard.

§ 367. **Witnesses.**—After the opening statement, the witnesses for the plaintiff are introduced. Under the early English common law a party to a suit was not permitted to testify in his own interest, the theory being that such a party would be so biased that his testimony could not be believed. That rule no longer exists. In the ordinary course of a trial the testimony of the witness is given orally in the form of answers to questions

put to him by counsel. The witness is first examined by the lawyer for the side which called him; this is termed his direct examination. He is then cross-examined by the opposing party to discover and bring to the attention of the jury any false or incomplete statements made in the direct examination. After the plaintiff has presented his evidence, the defendant introduces his witnesses.

§ 368. **Subpoena.**—The ordinary method of securing the attendance of a witness in court, if he does not attend voluntarily, is by a subpoena. A subpoena is a writ issued by the clerk of the court commanding the person named to appear and testify at the trial. Refusal to obey such a summons or a refusal to testify when called as a witness subjects the offending party to a fine for contempt of court.

§ 369. **The verdict.**—When the evidence and arguments have been closed on both sides, the judge instructs the jury in regard to the law and the rules of evidence by which their decision is to be governed. The jury then retires for private deliberation until it comes to a result. The decision of the jury is called a verdict. The twelve men must unanimously agree to enable them to render a verdict. However, in some states a certain majority may now return a verdict in a civil action. Formerly the jurors were confined without food or water until they were starved into unanimity. Now, if they disagree, a new trial with another jury is held, or the judge may set the verdict aside and grant a new trial if the verdict is not justified by the evidence, is irregular, or contrary to law.

§ 370. **Judgment.**—The suit having been decided by the rendering of a verdict, the judge enters a judgment in accordance therewith. When a judgment is given in favor of the plaintiff, it is generally to the effect that the defendant shall pay to the former a certain sum of money and also the costs of the court.

§ 371. **Execution.**—The process by which a judgment is enforced or executed against the defeated party is termed an execution. After the judgment is obtained, if the defeated party does not voluntarily pay it, an execution may at once be issued to seize and sell the property of the defendant to pay the costs and satisfy the judgment. If the defendant has no property, or only what is exempt from execution, then the judgment may fail. Exemptions differ in different states; they ordinarily consist of clothing, household goods of a certain value, tools of a trade, and even a homestead. The judgment remains in force for a time varying in different states (See § 72), and if the defendant acquires any property within that time it is liable to seizure.

§ 372. **Appeal.**—The party may, within a certain time after the verdict has been rendered, move for a new trial. The granting of a new trial is entirely within the discretion of the judge. He may set aside the verdict and order a new trial; or he may deny the motion and render judgment. If a new trial is denied, the defeated party may appeal from the judgment of the trial court and take an appeal to a higher court.

When an appeal is taken a transcript is made of the evidence, and with this the attorneys appear before an appellate court and present arguments to show why the judgment should or should not be reversed. The appellate judges hear the arguments on both sides of the case. If the judges find that a material error has been committed in the trial court or that the verdict is unjust, they may reverse the judgment, dismiss the case, or send it back for a new trial, or they may affirm the judgment. If the judgment is affirmed, the case is finally determined. If a new trial is ordered, the same procedure is repeated as in the original trial except that new pleadings are not necessary.

§ 373. **Brown vs. Foster adjudicated.**—Judgment in the lower court having been awarded in favor of the defendant, the plaintiff took an appeal to the Supreme Court, where it was held that if the plaintiff saw fit to work upon articles to the satisfaction of the defendant, he could recover upon the contract as it was made. If the other party is to be satisfied, it would yet be within the power of the defendant to reject the article as unsatisfactory. The contract permitted the defendant—and none other—to decide himself whether he would be satisfied. Therefore the plaintiff could not be relieved from the contract into which he voluntarily entered. (113 Mass. 136.)

QUESTIONS

What is a jury?

How is a jury summoned? Who, in your state, are exempt from jury service? May a woman serve on a jury? (Why?)

How are witnesses brought into court? What is a subpoena, and when must it be obeyed? How are witnesses examined as to their knowledge of the matter in dispute? Is the testimony written or oral?

What is meant by the verdict? Must it be unanimous (a) in civil actions, (b) in criminal prosecutions? What is the result when the jury can not agree on a verdict? In what respect does a jury act as a judge? It is said that a judgment follows the verdict—what is a judgment, and how enforced? How long is a judgment in effect? How does a judgment compare with a debt that is outlawed?

If, upon an examination of the whole record, it appears that judgment was given to the wrong party, is there a remedy and what is it? What is meant when it is said that the error must be one of substance and not merely of form?

Write a recapitulation of the subject of commercial law, with the idea of designating the most essential things you have learned in its study.

GLOSSARY OF LEGAL TERMS.

(The definitions of the following legal terms apply to words and expressions not defined elsewhere in the text. Refer to the index for other terms.)

Abrogate, repeal; annul or destroy; abolish entirely.

Acceptance, (1) an accepted bill; also (2) the assent by the person on whom a bill is drawn to pay it when due.

Acceptor, one who "accepts" an order or a bill of exchange.

Accused, a person charged with a criminal offense.

Acknowledgment, (1) admission of the execution of a writing made before a competent officer; (2) the formal certificate made by an officer.

Acquittal, judicial finding of not guilty.

Action, the legal right to bring or maintain a suit at law.

Adjudication, a judicial decision or sentence.

Administrator, person appointed by the court to take charge of the estate of a deceased person who died intestate.

Adult, one who has reached full legal age.

Affidavit, a voluntary sworn statement in writing.

Affirm, a solemn declaration to tell the truth, under the penalty of perjury.

Alias, Latin word meaning another name; an assumed name.

Alibi, elsewhere; in another place when a wrongful act was committed.

Alien, citizen of one country residing in another.

Alienate, to transfer title to real property by a legal conveyance.

Alimony, allowance made to a woman living apart from her husband.

Allegation, statement of a fact in a legal proceeding.

Alteration, change or substitution of one thing for another.

Ambiguity, doubtfulness and uncertainty in regard to meaning.

Ancestor, one from whom an estate has descended.

Annuity, a sum payable yearly for a certain or uncertain period.

Annulment, act of making void.

Answer, written statement of defendant's claim, as to the facts in the case.

Ante-date, date prior to the true one; an earlier date.

Arbitration, the trial and determination of a controversy by persons chosen by the parties to the dispute.

Arraign, accuse; impeach; answer to the charge of an indictment.

Assault, attempt to do hurt to another by physical violence.

Assent, consent; concur.

Assets, property available for payment of debts.

Assign, transfer of property or a right to another.

Assignee, one to whom property has been transferred.

Attachment, legal process by which property is taken into custody pending a suit.

Attest, bear witness by a signature.

Attorney, one legally appointed to act for another.

Avoid, make void; annul.

Award, the decision of arbitrators.

Bail, security given for the appearance of a person in court.

Bankrupt, one who has been judicially declared unable to meet his liabilities.

Battery, unlawful beating of another.

Bequest, gift of personal property by will.

Bilateral, a contract executory on both sides.

Bona Fide, in good faith; without deceit or fraud; genuine.

Bond, an instrument under seal, in which a person binds himself to pay to another a sum of money.

Breach, in contracts, the violation of an agreement or obligation.

Brief, written or printed arguments or authorities furnished by a lawyer to a court.

Burglary, breaking open and entering a dwelling with the intent to commit a felony.

Case, statement of facts upon which an action in court is based.

Chattel, any article of personal property.

Civil, distinguished from criminal or political.

Client, one who employs a lawyer—to represent him in legal matters.

Code, compilation of laws by public authority.

Codicil, addition to a will, and modifying it in some respects.

Collateral, security (usually stocks or bonds) given for borrowed money.

Collusion, secret agreement between two or more persons designed to obtain an object forbidden by law.

Competency, legal power; adequacy or ability.

Compromise, settlement reached by mutual concessions.

Consanguinity, relationship by blood.

Consignee, one to whom goods are shipped.

Conveyance, act by which title to real property is transferred.

Corporeal, tangible property, as a book or a boat.

Covenant, promise contained in a sealed instrument; solemn compact.

Coverture, relating to the legal rights of a woman during marriage.

Crime, violation of human law; an omission of a duty or the commission of an act forbidden by law.

Curator, a legally appointed custodian of property or persons.

Custody, care and safe-keeping of property.

Damage, compensation which the law awards for a wrong or injury done.

Deceit, device or false representation by which one person misleads another to his injury.

Decree, judgment or decision of a court.

Default, non-performance of a duty or obligation.

Defendant, person against whom a suit is brought.

Defense, denial of the truth of the complaint.

Demur, raise an objection; take exceptions.

Deposition, testimony taken down in writing, under oath.

Descent, hereditary succession of an estate.

Disability, incapable of performing a legal act.

Disaffirm, repudiate; refuse to confirm.

Divorce, dissolution of the marriage ties.

Domicile, place where a man has his home.

Easement, the right which one person has to use the land of another for a special purpose.

Emblements, growing crops which have been sown or planted, and which a tenant may remove after the expiration of his term.

Enact, make into a law; establish by a legal act.

Equitable, just; fair; right; reasonable.

Escrow, a deed, bond, or other written document held in trust by a third person.

Estate, an interest in property.

Estoppel, a rule of law which precludes a man from denying certain facts in consequence of his previous conduct or admissions.

Eviction, the expulsion of an occupant of real property.

Evidence, proof; testimony.

Execution, a writ which authorizes an officer to carry into effect the judgment of the court.

Executor, person named by the maker of a will to carry out its provisions.

Ex Parte, upon or from one side only.

Extradition, the surrender by one government to another of a person charged with a crime.

Factor, an agent appointed to sell goods on commission.

Fiduciary, involving a relation of trust or confidence.

Foreclosure, proceeding by which the right of the mortgagor to redeem his property is extinguished.

Forfeiture, loss of some right or privilege.

Franchise, a right or privilege conferred by law.

Guardian, one who has the care of another.

Garnishment, a process whereby property is attached.

Heir, one who inherits by right of relationship.

Indemnity, something given or promised to save another from loss or damage.

Indenture, a writing containing a contract.

Indictment, formal charge preferred by a grand jury.

Infant, any person not of full legal age.

Injunction, judicial order or decree forbidding the doing of a certain act.

Insolvency, state of being unable to pay one's debts.

Instrument, a written document.

International Law, customs, usages, and treaties observed by nations in their intercourse with one another.

Intestate, one who dies without making a valid will.

Invalid, void; of no legal effect.

Judgment, decree or sentence of a court.

Legacy, gift of personal property by will.

Legal, based upon law.

Legatee, one to whom a legacy is given.

Levy, taking possession of property to satisfy a judgment.

License, permit to do an act which would otherwise be unlawful.

Lien, a right to retain another's property as security for a debt or claim.

Liquidated Damages, amount agreed upon in advance by the parties to a contract, to be paid in case of a breach.

Litigation, a suit at law; a judicial contest.

Malfeasance, wrongful doing of some act.

Malice, ill will towards some person.

Mandamus, a writ issued by a court directing the performance of certain acts.

Merger, the absorption of one contract or interest in another.

Misrepresentation, a false and fraudulent statement.

Negligence, the omission to do what a reasonable, prudent person would do, or doing what such a person would not have done.

Nominal Damages, a trifling sum given for the violation of a right where no actual loss has resulted.

Nuisance, something which wrongfully disturbs another in the enjoyment of his own.

Obligation, a legal duty.

Ordinance, rule or law passed by the legislative body of a city.

Ouster, ejection; dispossession.

Perjury, willful false testimony under oath in a judicial proceeding.

Parol, expressed orally; not in writing.

Parole, conditional pardon.

Per Se, in itself.

Plaintiff, one who brings an action in a court.

Pettifogger, an inferior or unprincipled lawyer.

Precedent, authority followed in courts of justice; a previous decision in a similar case.

Probate, a court having jurisdiction over estates.

Prosecute, proceed against by legal means.

Prima Facie, at first view; apparently true.

Proxy, substitute; person authorized to act for another.

- Ratification**, confirming a contract which was executed without authority.
- Realty**, same as real property.
- Receiver**, person appointed by a court to take charge of property pending litigation.
- Release**, surrender or relinquishment to another of a right, claim, interest, or estate.
- Remedy**, legal means employed to enforce a right or redress a wrong.
- Replevin**, an action to recover possession of property unlawfully detained.
- Rescission**, canceling or annulling a contract or deed.
- Revocation**, the annulment or cancellation of an instrument, act, or promise.
- S. S.**, abbreviation for the Latin word *scilicet*, meaning, to wit; namely; that is to say.
- Sentence**, penalty pronounced upon a person convicted of a crime.
- Severance**, the removal of crops or fixtures from land.
- Subpoena**, a writ commanding a person to appear as a witness.
- Suit**, the prosecution of some claim in a court of justice.
- Summons**, a notice to a person to appear in court.
- Technicality**, "a quibbling nicety."
- Testimony**, proof; evidence; statements of witnesses.
- Trespass**, an unwarranted invasion of another's right or liberty.
- Trustee**, one who holds property for the benefit of another.
- Ultra Vires**, beyond the power; exceeding authority.
- Unilateral**, one-sided, applied to contracts where only one promise is still unperformed.
- Usury**, taking of more than the legal rate of interest.
- Verdict**, decision rendered by a jury.
- Versus**, against; abbreviated *vs.*
- Venue**, the place where the trial is held.
- Waiver**, voluntary surrender or relinquishment of a right or privilege.
- Waste**, damage or destruction done or permitted to property by a tenant.
- Witness**, (1) a person who gives evidence in court; (2) one who sees a document executed and signs his name thereto.
- Writ**, a formal written command issued from a court of law.

LEGAL MAXIMS.

Ignorance of the law excuses no one.

No one is bound to do what is impossible.

No injury is done by things long acquiesced in.

An action is not given to one who is not injured.

If the plaintiff does not prove his case the defendant is absolved.

No one is responsible for inevitable accidents.

It is one thing to possess; it is another to be in possession.

A person ought not to be judge in his own cause.

One alleging his own infamy is not to be heard.

The intention of the parties is the soul of the instrument.

Good faith does not allow us to demand twice payment for the same thing.

Let the buyer beware. *Caveat emptor.*

That is sufficiently certain which can be made certain.

An evidence of debt found in possession of the debtor is presumed to be paid.

Where two parties are equally in fault the party in possession has the better case.

Time runs against the slothful and those who neglect their rights.

The law does not notice trifling matters.

A day begun is held as complete.

Gathered fruits are not part of the farm.

The law speaks to all with one mouth.

What I can not do in person I can not do through the agency of another.

A simple proposition needs no exposition.

Outward acts indicate the inward intent.

The burden of proof lies on the plaintiff.

An act done by me against my will is not my act.

It is not lawful to build upon one's own land what may be injurious to another.

The words of the law must not be departed from.

No one is in duty bound to accuse himself unless before God.
Acts indicate the intention.

A personal action dies with the person.

The act itself does not make a man guilty, unless his intention be so.

Judges do not decide questions of fact; the jury do not decide questions of law.

Equity looks upon that as done which ought to have been done.

Equity can not alter the law of the land, but follows it.

A person boasting of his own wrongdoing is not to be heard.

An ambiguity is taken against the party using it.

Water flows and should be allowed to flow.

Constructions of documents are to be made favorably, that the instrument may rather avail than perish.

No man should be condemned unheard.

To conceal is one thing; to be silent another.

Good faith demands that what is agreed upon be done.

The custom of the place is to be observed.

The principal part of everything is the beginning.

He is clear of blame who knows, but can not prevent.

The law sometimes sleeps, but never dies.

Fraud and deceit should excuse no man.

That is certain which can be made certain.

The law helps persons who are deceived, not those deceiving.

He who comes into court must come with clean hands.

A right can not arise from a wrong.

Many promises lessen confidence.

A thing void in the beginning does not become valid by lapse of time.

Ratification is equal to command.

When the law presumes the affirmative, the negative is to be proved.

Two can not possess the whole of one thing in its entirety.

The proof lies upon him who affirms, and not upon him who denies.

Equity imputes an intention to fulfill an obligation.

Equity regards the spirit and not the letter.

Equity looks at the intention of the parties, and not at the actual words employed in any transaction.

From what goes before and what follows, the best interpretation is arrived at.

Every simple contract must be supported by a valuable consideration.

The execution of the law works no injury.

What is expressed makes what is implied to cease.

False in one thing, false in all.

He who flies from justice acknowledges himself a criminal.

A trust is the obligation of one's conscience to fulfill the intention of another.

He who conceals a fraud perpetrates one himself.

That is unnecessarily done by many words which is capable of being done by fewer.

Let a madman be punished by his madness alone.

A general rule must be generally understood.

He who seeks equity must do equity.

This indeed is hard, but it is the written law.

The punishment should be in the same place as the guilt.

That is certain which can be reduced to a certainty.

Not to be and not to be legally proved are the same thing.

In similar cases, the remedy should be similar.

In all criminal charges the proofs should be as clear as day.

An accused person is always entitled to receive the benefit of the doubt.

The law has regard to things near at hand, and not to those remote.

In criminal acts the intention is to be sought or examined rather than the result.

In case of equal fault the position of the defendant is the better.

The strictest good faith must be exercised in partnership transactions.

In wills we seek more especially for the testator's intention.

One wrong does not justify another.

It is to the advantage of the State that there should be a limit to lawsuits.

A benefit is not conferred upon an unwilling recipient.

Judges are not compelled to give reason for their opinions, judgments or sentences.

It is for the judge to administer, not to make the law.

When the law gives a man anything, it gives him that also without which the thing itself can not exist.

When anything does not operate in the way one intends, let it operate as far as it can.

He who is first in point of time is preferred in law.

He who receives the advantage ought also to suffer the burden.

He who is silent appears to consent.

Let him be deceived who wishes to be deceived.

Everyone experienced in his own calling is to be believed.

That which was void from its commencement does not improve by lapse of time.

You can not lawfully condone an offense by receiving back stolen property.

The Constitution of the United States forbids excessive bail or cruel punishment.

That which necessity compels, she excuses.

What is the property of no one, belongs to the King.

That which a people has last ordained shall be the established law.

A thing done between two persons ought not to injure another.

A point judicially decided is taken to be correct.

The public safety (welfare) is the supreme law.

Equal knowledge on both sides makes the position of the contracting parties the same.

One should know with whom he contracts.

In obscure constructions the law follows that which is least obscure.

Presumption is ever in favor of the negative.

So enjoy your own rights as not to injure those of another.

Statutes passed for the public good should be construed literally.

Where the law is most strictly administered, it sometimes causes the greatest wrong.

Withholding the truth suggests falsehood.

A will speaks from the time of death only.

The reason of the law being at an end, the law itself ceases.
Unusual clauses always excite suspicion.

No one should have an advantage from his own wrong.

Custom is protected by the law.

No prescription runs against one unable to act.

The bestower of a gift has a right to regulate its disposal.

When one divides, the other has the right of first choice.

So use your own powers and property as not unjustly to do injury to another.

In a conflict between public and private rights the public right must prevail.

The execution of the law does not work a legal injury.

Every presumption of the law must be in aid of justice.

Former laws inconsistent with later laws are by the later laws repealed.

He who receives the advantage ought also to suffer the burden.

Let him be deceived who wishes to be deceived.

He who acts through another acts through himself.

He who considers only the mere wording of a document goes but skin deep into its meaning.

He proves nothing who proves too much.

He who does not blame, approves.

Let him who sins when drunk be punished when sober.

Gross negligence is equivalent to intentional wrong.

He who willingly confesses should be dealt with more leniently.

The law cares not about mere trifles.

Debts follow the person of the debtor.

An agent can not delegate his authority.

An extravagant debtor is condemned in the eye of the law.

Sunday is not a day for judicial proceedings.

A deceitful person is skilled in general matters.

The house of one man is a castle for himself only, and not for one who flies to him for protection.

Clandestine gifts are always suspicious.

The delivery of a deed makes it effectual.

Where there is a legal right there is a remedy.

To be silent or to conceal are two different things.

A deed can only be revoked by a deed.

That which is useful is not vitiated by that which is useless.

Words of deeds or grants are to be taken most strongly against the grantor.

Words ought to be understood with effect that a thing may rather be preserved than destroyed.

No man can make another his debtor against his will.

The loser must defray the costs of a successful litigant.

Laws come to the help of the vigilant, not of the sleepy.

In criminal cases the intention and not the result is regarded.

Words referred to are deemed to be incorporated.

Regard is to be had, not to what is said, but to what is done.

Those who make a mistake are not considered to consent.

Lapse of time will not generally bar the right of the State.

Odious and dishonest things are not to be presumed in law.

A duty should be injurious to no one.

Every presumption is made against a wrongdoer.

Custom is the best interpreter of law.

Private contracts can not repeal the public right.

One eyewitness is worth more than ten hearsay.

The condition of one in possession is the more preferable.

Caution is better than cure.

When anything is ordered to be done, everything by which it is to be accomplished is also impliedly authorized.

Subsequent laws repeal former ones.

The law does not enforce impossibilities.

What is written endures; things spoken speed away.

Every accused person is presumed in the law to be innocent until he be proved guilty.

An evil custom ought to be abolished.

Justice is better when it prevents rather than punishes with severity.

It is better to go to the fountain head than to follow rivulets.

He who spares the guilty threatens the innocent.

Death is said to be the extreme penalty.

Many have known many things; no one has known everything.

No one can give what he has not.

INDEX

Abstract of title.....	233	Caveat emptor.....	132
Acceptance of offer, 26; bill of exchange	72	Certificate of deposit, 78; of protest, 101; of stock.....	206
Accession	7	Chattels	7
Accommodation indorser	96	Cheats	263
Accord and satisfaction.....	55	Checks, 82; certification, 83; rights of holder, 84; when payable....	82
Acknowledgment	236	Compensation Laws	179
Acquisition	7	Competency	19
Act of God.....	151	Consent	29
Action, 271; parties to.....	272	Consideration, 39, 90, 107, 117; adequacy, 40; illegal, 42; impossible, 42; insufficient, 41; moral, 41; past.....	41
Age, legal	19	Constitutions	1
Agency	163	Contracts, 11; assignment of, 48; elements, 16; executed, 12; executory, 15; express, 12; illegal, 33; implied, 12; operation of, 48; oral, 12; parties, 19; simple, 12; specialty, 15; Sunday, 34; termination, 55; written.....	12, 51
Agents, 163; appointment, 167; classes, 164; distinguished, 164; duties and liabilities, 169, 170, 171; how terminated, 173; who may be	167	Contribution	110
Agreement	25	Copyright	8
Alienation	231	Corporations, 197; capital stock, 200; charter, 200; dissolved, 208; managed, 202; partners compared, 209; powers.....	201
Alteration	231	Correspondence	26
Appeal	279	Courts, 274, 275; jurisdiction of..	272
Appurtenance	233	Crimes	262
Articles of agreement.....	51	Criminal, conspiracy, 264; offenses	261
Arson	266	Cumulative voting.....	202
Assignability	68	Curtesy	229
Assignment, 48, 211; form of, 49; notice, 49; by operation of law, 49; rights acquired by.....	49	Damages, liquidated, 63; measure of	63
Auction sales	127	Dartmouth College case.....	50
Bad Check Laws.....	83	Date	91
Baggage	160	Deed of trust.....	247
Bailments, 137; bailor and bailee, 140-143, 168; classification....	138	Deeds, 231; delivery, 236; kinds, 234; parts, 235; recording.....	236
Bank draft	85	Defenses	99
Bankruptcy	60	Delivery, by carrier, 154; seller...	130
Barter	117, 138	Dissolution of partnership.....	192
Bill, of lading, 155; of sale.....	118	Dower	229
Bills of exchange, 71; defined, 71; foreign and inland, 72; use of...	73	Draft, 71; time or sight.....	72
Blue Sky laws.....	209	Drawer's contract	73
Boarders or guests	147	Due bill	77
Boardinghouse keepers	149	Duress	31
Bonds	79		
Capital stock.....	200		
Care	138		
Carriers, 150; common, 150; duties, 150; liability, 151, 152; lien, 155; private, 146; public.....	159		

Embezzlement	268	Larceny	267
Eminent domain.....	229	Law, defined, 1; bulk sale, 127;	
Equity of redemption.....	247	civil, 4; commercial, 4; common,	
Essential elements.....	16, 88, 114	3; criminal, 261; merchant, 4;	
Estates in land.....	228	Roman, 4; statute, 2; workmen's	
Execution	278	compensation	179
Fee, simple	228	Leases	249
Fellow-servant	177	Legal tender	57
Felony	262	Letter of credit	85
Fixtures	257	Libel	265
Foreclosure	247	Limited partnership	194
Forfeiture	9	Lost property	136
Forgery	269		
Forms of written instruments, 54;		Married women	22
acceptance of draft, 72; articles		Master and servant.....	176
of association, 199; bank draft,		Maxims, legal.....	282
85; bond, 80; bill of exchange,		Misdemeanor	262
71; lading, 155; sale, 118; certi-		Mistake	29
fied check, 84; check, 82; in-		Mortality table	220
dorsements, 96; insurance pol-		Mortgage	245
icy, 223; notes, 76; land con-		Mutual promises.....	40
tract, 233; lease, 251; letter of			
credit, 86; mortgage, 246; part-		Necessaries	20
nership agreement, 184; power		Negligence	178
of attorney, 168; deed, 237; will,	242	Negotiability	68
Fraud	29, 111, 216	Negotiable instruments, 67; form	
		and interpretation, 88; kinds, 71;	
		nonessentials	91
Gambling contracts.....	33	Negotiation	94
Glossary	280	Notary public	101
Goods	117		
Grace, days of.....	92	Offer and acceptance.....	25
Guarantor	108	Parties.....	19, 48, 72, 76, 106, 114, 137
Guaranty and suretyship.....	106	Partners, authority, 190; liability,	
Guests	147	191; who may be.....	182
		Partnerships, 117; classified, 182;	
Hereditaments	225	dissolved, 192; formed, 183;	
History of a lawsuit.....	271	name, 186; property, 187; test	
Holder in due course.....	68	of	185
		Passengers	159
Idiots	21	Patents	8
Illegality	33	Pawnbrokers	144
Indemnification	172	Payment	41, 56, 110
Indemnity	109	Performance, 55; past, 41; spe-	
Indorsements, 94; conditional, 95;		cific	64
contract of, 94; blank, 95; forms		Place	91
of, 95; full, 95; qualified, 95;		Pleadings	272
warranties	96	Pledge	144
Infants	19	Power of attorney.....	168
Innkeepers	147	Precedents	3
Insanity	21	Premium	222
Insurable interest	215, 220	Presentment	99-104
Insurance, 211; companies, 213;		Promissory notes.....	76
contract, 213; fire, 215; kinds,		Property, 6; acquisition of, 7; per-	
211; life, 220; policy, 215, 220;		sonal, 6; real	6, 225
terms, 212; risk	217	Protest	101
Interest, legal rate.....	35	Proxy	203
		Public authority, 152; enemy, 152;	
Joint stock companies.....	195	policy	35
Judgment	9, 278	Punishment	263
Jury	277		
		Ratification	20, 168
Land	226	Recording	236
Landlord and tenant.....	249-256		

Reimbursement	172	Telegraph and telephone compa-	161
Representations	216, 221	nies	161
Restraint, of marriage, 35; ser-		Tender, 56; legal, 57; not legal...	58
vice, 33, 34; trade	35	Termination of contracts	55
Revocation of offer	25	Torrens system	238
Reward	25	Torts	261
		Trade acceptance	72
Sale, by auction, 127; description,		Transfer of title	124
134; sample	134	Trees, ownership	226
Sales of personal property	113	Trespass	266
Seals	15	Trial	277
Seller's lien	129	Trust deeds	247
Servants	164	Undue influence	31
Statute of frauds, 44, 120; limita-		Usury	34, 35
tions, 64; table of	65		
Stock, watered, 205; transfer of..	206	Valid	15
Stockholder, 204; liability of, 208;		Value received	91
rights of	207	Void	15
Stoppage in transitu	129	Voidable	15
Subject-matter	33, 114		
Subpoena	278	Warehouseman	143
Subrogation	109	Warranties, 217, 221; express,	
Suicide	222	132; implied	133
Summons	272	Wills	240
Surety, 108; companies	111	Wrongs	261

Nature

Moral.

~~Municipal~~

International.

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